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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70,
Petitioner,

vs.

CALIFORNIA TRUCKING ASSOCIATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether issues of contractual application and interpretation which are determinative of the obligation to submit to the grievance procedure should be decided by the court or remitted to the parties' established procedure for resolution where that grievance procedure is broadly defined?

2. Whether a presumption against arbitrability applies to the question of whether parties have agreed to decide what disputes are subject to a contractual grievance procedure when there is contractual language which arguably remits such questions to the parties' grievance procedure rather than the court?

3. Is exhaustion of contractual remedies jurisdictional to any contract claim brought under 29 U.S.C. section 185 so that the issue of jurisdiction may be raised at any time?

4. Whether the implied no-strike obligation of *Teamsters Local 174 v. Lucas Flour*, 369 U.S. 965 (1962), is applicable to a collective bargaining agreement which includes a grievance procedure but specifically prohibits final and binding arbitration?

5. Whether the implied no-strike obligation of *Lucas Flour* extends to a union's dispute over the terms and conditions of a new agreement, which dispute is not subject to a grievance procedure designed to resolve disputes over the interpretation of the agreement?

6. Whether the court could infer a no-strike obligation into a portion of the collective bargaining agreement in

contravention to the parties' settled interpretation of the relevant language where that interpretation is the result of a final and binding decision of a joint labor-management committee?

7. Whether damages may be assessed for stranger picketing where there was no clear and unmistakable waiver of the union's right to engage in picketing outside of its bargaining unit?

LIST OF INTERESTED PARTIES

1. California Trucking Association
2. Associated Freight Lines
3. Consolidated Freightways
4. Pacific Motor Trucking Company
5. Crescent Truck Lines
6. California Motor Transport/California Motor Express
7. Delta Lines, Inc.
8. Haslett Co.
9. Lodi Truck Service
10. East Texas Motor Freight System (successor to Valley Copperstate)
11. System 99
12. T.I.M.E.-DC, Inc.
13. Western Gillette, Inc.
14. Alltrans Express of California, Inc.
15. Transcon Lines
16. Di Salvo Trucking Co.
17. Lee Way Motor Freight, Inc. (successor to Pacific Express Transportation)
18. Morris Draying Company
19. Navajo Freight Lines, Inc.
20. Frank's Trucking
21. Pacific Intermountain Express Company

22. Garrett Freightlines, Inc.
23. Sterling Transit Co., Inc.
24. Yellow Freight System
25. O.N.C. Freight System
26. IML Freight, Inc.
27. Willig Freight Lines
28. Coast Drayage
29. Granny Goose Foods, Inc.
30. Sunshine Biscuit, Inc.
31. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70

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CALIFORNIA TRUCKING ASSOCIATION, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brotherhood of Teamsters and Auto Truck Drivers Local 70 respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

I

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 679 F.2d 1275 and appears as Appendix A. This opinion affirmed in part, and reversed in part, a judgment of the District Court for the Northern District of California which had entered an opinion, which appears as App. C. The

District Court had previously issued memoranda ruling on some of the issues involved in this Petition which appear as Appendixes D, E, F and G, respectively. They are unofficially reported at 86 LRRM 2683, 88 LRRM 2030, 94 LRRM 2981. The order denying the Petition for Rehearing is Appendix B.

II

JURISDICTION

The opinion of the court was initially filed on October 19, 1981. A timely petition for rehearing was denied on June 3, 1982, with certain modifications of the court's opinion. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

III

STATUTORY PROVISIONS

29 U.S.C. section 185 reads in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

IV

STATEMENT OF THE CASE

This matter involves suit brought by a multi-employer bargaining group, as well as two individual snack food houses, seeking damages for two separate strikes occurring in April and May of 1970. Two separate suits were filed which were eventually consolidated by the district court.[1]

In pretrial orders, the district court dismissed individual defendants, stayed all proceedings with respect to claims occurring on or after May 18, 1970, because the employers had not exhausted the grievance procedure, and denied the same motion with respect to any claims occurring before that date. App. D, E, F and G.

The trial of this matter to the court was held on various days in 1975 and 1976. After post-trial briefs, the district court entered its memorandum opinion holding the Union liable for both strikes and assessing damages in excess of three million dollars. A timely motion for new trial was filed. Although the court denied that motion, the judgment was amended and certain minor damage claims were deleted.

The court of appeals affirmed in large respect the district court's findings, but reversed and remanded with respect to certain damage computations.

As we shall show, fundamental questions concerning collective bargaining agreements are presented by this petition. Before proceeding to the reasons why the petition should be granted, we need to summarize the relevant facts.

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[1] There were related proceedings before the National Labor Relations Board involving allegations that Local 70 violated 29 U.S.C. § 158(b)(1)(B) and § 158(b)(3). See, *Brotherhood of Teamsters and Auto Truck Drivers, Local No. 70*, 194 N.L.R.B. 674, *enf'd* 470 F.2d 509 (9th Cir. 1972) *cert. den.* 414 U.S. 821 (1973); and *Brotherhood of Teamsters, Local 70*, 195 N.L.R.B. 454 (1972). See also *Granny Goose Foods v. Teamsters Local 70*, 415 U.S. 423 (1974).

The employers involved are twenty-seven motor carriers and two snack food manufacturing companies who employ Teamster drivers. The motor carriers were members of a multi-employer bargaining unit known as the California Trucking Association. Through this multi-employer association a national collective bargaining agreement was negotiated known as the National Master Freight Agreement (hereinafter NMFA).[3]

Teamsters Local 70 represents only local pick-up and delivery drivers, and its jurisdiction is limited to Alameda County, California. Each of the employers maintains a terminal or facility in that county, of which only a portion of its employees are represented by Local 70. The remainder of their employees are represented by other unions.

Local 70, as an affiliate of the International Brotherhood of Teamsters, is a party to the NMFA. In addition to the national agreement, there are also local supplemental agreements which cover local geographical areas. This suit is concerned with the Joint Council No. 7 Supplement (JC7 Supp.).

The 1967-1970 NMFA and its supplements were in effect for the period April 1, 1967, to March 31, 1970. Pursuant to Art. 37, Sec. 2, a notice was given in late 1969 that the Union wished to negotiate revisions in the collective bargaining agreement. Negotiations commenced with the employers in Washington and continued throughout the spring of 1970. It is undisputed that there was a failure to agree upon any revisions until April 2, 1970, when a "tentative settlement" was agreed upon. That settlement was eventually ratified and became the 1970-1973 NMFA.

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[3] Relevant provisions of the 1967-1970 and 1970-1973 agreements appear at App. I.

As of midnight, March 31, 1970, there was no agreed-upon collective bargaining agreement, and Local 70 took strike action against some of the carriers involved in this action. That action was eventually extended to other employers on April 3. The initial work stoppage ceased on April 7, and all of Local 70's members returned to work immediately thereafter. The court below found that Local 70 initiated the strike action at a time when no agreement was reached and because Local 70 was dissatisfied with the progress of the negotiations and wished to break away from the multi-union bargaining group.

The May strike action is somewhat different. In Los Angeles, several hundred trucking industry employees had been fired as a result of work stoppages which had occurred in early April and were engaged in wildcat picketing. Early in May, a number of the wildcat strikers from Los Angeles came north and began picketing in Local 70's area. Local 70 adopted the cause of the wildcat strikers and began pressuring the trucking employers to negotiate a separate agreement with the Union. The court below found that Local 70's continued interest in a separate agreement was a cause of the strike. The strike in May lasted until late May or, in some cases, into June.

The district court imposed liability on Local 70 for the five working days of work stoppage in April, as well as the work stoppages in May through May 17. The court stayed all proceedings with respect to damage claims occurring on or after May 18, finding that the 1970-1973 NMFA required the employers to exhaust the contractual grievance procedure. The employers have not pursued those damage claims.

V

WHERE THE PARTIES HAVE AGREED TO A BROAD GRIEVANCE PROCEDURE, UNDER THE PRESUMPTION OF ARBITRABILITY CREATED IN THE STEELWORKERS TRILOGY, ISSUES OF CONTRACTUAL INTERPRETATION WHICH MAY DETERMINE THE ARBITRABILITY OF A DISPUTE SHOULD BE DETERMINED THROUGH THE GRIEVANCE PROCEDURE

When this Court created the presumption of arbitrability in the Steelworkers Trilogy,[3] it was not envisioned that the same principle would apply to employer claims of a union violation of a collective bargaining agreement. Subsequently, this Court recognized that the same doctrine should apply where employers lodged claims that the union had violated the collective bargaining agreement, particularly where an unlawful strike was conducted. *Drake Bakeries, Inc. v. Local 50, Bakery Workers,* 370 U.S. 254 (1962).

Yet in determining what matters are subject to arbitration this Court has stated that the question of arbitrability is one that is reserved to the court, a statement which has led to conflicting results in the federal court system. When declaring that questions of arbitrability are to be decided by the court,[4] this Court has not confronted the problem that it often requires an interpretation of the agreement itself to determine whether a matter is subject to resolution through the grievance procedure even though the parties have intended to resolve disputes determining arbitrability through their grievance procedure. For example, whether a specific exception to arbitration applies to a particular dispute may require arbitration.[5] Or whether the grievance procedure encompasses employer grievances may also demand the same interpretative procedure.[6]

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[3] *United Steelworkers v. American Manufacturing Co.,* 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Emp. Gulf Navigation Co.,* 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960).

[4] *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241 (1962); *International Union of Operating Engineers v. Flair Builders, Inc.,* 405 U.S. 487, 491-92 (1972) and *John Wiley and Sons, Inc. v. Livingston,* 376 U.S. 543 (1964).

From these examples it is apparent that the courts have applied contradictory methodology to determining arbitrability: in some cases interpreting the contract themselves or in other cases remanding the question of contract interpretation for the arbitrator to determine the "arbitrability." This case presents an important opportunity to resolve the tension between those methodologies by declaring firmly that where the question of arbitrability is *also* of contractual interpretation that it should be normally decided through the arbitration procedure, contrary to the ruling of the court below.[7]

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[5] *Johnston-Tombigbee Furniture Manufacturing Co. v. Local Union No. 2462, Carpenters*, 596 F.2d 126, 128-29 (5th Cir. 1979); *CBS, Inc. v. International Photographers, IATSE*, 603 F.2d 1061 (2nd Cir. 1979); *Wire Service Guild Local 222 v. U.P.I., Inc.*, 623 F.2d 257 (2nd Cir. 1980); *Desert Coca-Cola Bottling Co. v. General Sales Drivers Local 14*, 335 F.2d 198 (9th Cir. 1964); *Carpenters District Council v. Brady Corp.*, 513 F.2d 1 (10th Cir. 1975); *Marble Products Co. v. Local 155, United Stone Workers*, 335 F.2d 468 (5th Cir. 1964); and *contra, Strauss v. Silvercup Bakers, Inc.*, 353 F.2d 555 (2d Cir. 1965).

[6] See *I.T.T. World Communications, Inc. v. Communication Workers*, 422 F.2d 77 (2nd Cir. 1970); *International Association of Bridge Etc. v. Superior Court*, 80 Cal.App.3d 346 (1978); *but cf. Friedrich v. Local No. 780*, 515 F.2d 225 (5th Cir. 1975) and *G. T. Schjeldahl Co. v. Local Lodge 1680*, 393 F.2d 502 (1st Cir. 1968).

The confusion created in the federal courts by these contradictory approaches is demonstrated in four different ways in this case. In each situation, the court imposed its own interpretation of the agreement in order to determine that the dispute was not subject to the grievance procedure where the parties "[b]y their contract [have] clearly expressed their preference for an arbitral, rather than a judicial interpretation of their obligations under the contract." *Nolde Bros., Inc. v. Bakery and Confectionary Workers,* 430 U.S. 243, 253 (1977).

First, we pointed out that the 1970-1973 NMFA explicitly provided for the resolution of damage claims through the grievance procedure. The court, in part, accepted that argument and stayed proceedings with respect to any damage claims occurring on or after May 18. App. D and E The court however utilizing parole evidence ruled that any claims arising before that date were not subject to the grievance procedure, notwithstanding explicit language of the 1967-1970 NMFA which provided in Art. 37, Sec. 3 that "Revisions agreed upon or ordered shall be effective as of April 1, 1970 . . ." Although we agree that there is conflicting evidence regarding the complete retroactivity of the new agreement, the controversy invokes the problem of interpretation of the agreement as well as the intent of the bargaining parties. As we note in the margin, the courts of appeals have taken contradictory positions as to whether arbitrability questions arising out of the termination and/or retroactivity of an agreement is to be decided by the court or the parties through their grievance procedure.[8] The court adopted the proposition that although the question of retroactivity was one involving the interpretation of the agreement it was to be accomplished by the court since it ultimately determined the issue of arbitrability. App. A, note 5, and E, p 3-4. Contrariwise, the district court held that the Union could have "submit[ted] to the grievance procedure the question[] whether or not the contracts had expired." App. C p. 34. There is no resolution of this inconsistency.

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[7] We are not dealing with a situation where the court is called upon to determine the existence of the contract, or the existence of an arbitration provision, something fully reserved to the court. Moreover, the grievance procedure is broad enough to encompass the disputes mentioned before.

Second, we contended that the employers' damage claims were factual disputes which did not involve an interpretation of the master agreement and, therefore, had to be submitted to the local grievance procedures contained within the supplemental agreement. App. C p. 16-19. We did so because the JC 7 Supp. grievance procedure was far broader than that of the NMFA procedure and applied to "any grievance or controversy affecting the mutual relations of the Employer and the Union . . ." as well as avoiding the implication of Art. 8(d) discussed, *infra* p. 12. Whether the dispute was "factual" or "interpretative" requiring processing of the dispute at different levels of the grievance procedure, is certainly one of procedure even though ultimately determining the arbitrability of the dispute.[9]

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[8] See *Local Union No. 4 v. Radio 1380, Inc.*, 469 F.2d 610, 614 (8th Cir. 1972); *Rochdale Village, Inc. v. Public Service Employees Union Local No. 80*, 605 F.2d 1290, 1296 (2d Cir. 1979); *Chattanooga Mailers v. Chattanooga News-Free Press*, 524 F.2d 1305, 1315 (6th Cir. 1975); but *cf. International Union, United Automobile Workers v. I.T.T.*, 508 F.2d 1309 (8th Cir. 1975) and *Kaufman & Broad v. International Brotherhood of Firemen*, 607 F.2d 1104, 1108-112 (5th Cir. 1979).

Third, we pointed out that even if the parties had agreed in Art. 8(d) to permit direct legal action where the "strike" was in violation of the agreement we contended that "In any event, work stoppages, sick-outs and picketing were not strikes and, therefore, any claims for damage resulting from such actions also had to be submitted to the grievance procedures." App. A, Note 8. The district court sweepingly rejected this claim by finding that the word strike was synonymous with those terms. Surely this was an intrusion into the interpretation of the agreement.[10] *Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products*

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[9] Although the courts have recognized that procedural questions arising out of the processing of a grievance are to be decided by the arbitrator, *Wiley & Sons v. Livingston*, 376 U.S. 543 (1964); *Marshall Hale Memorial Hospital v. Hospital & Institutional Workers Union, Local 250*, 647 F.2d 38 (9th Cir. 1981), the courts have sometimes taken upon themselevs to determine the question of arbitrability which arises out of conflicting grievance procedures. See *United Association Local No. 725 v. Honeywell, Inc.*, 607 F.2d 659 (5th Cir. 1979) and *Local 675, U.A. v. Honeywell, Inc.*, 652 F.2d 1301 (9th Cir. 1981). But cf. *Kentucky-West Virginia Gas Co. v. O.C.A.W. Local No. 3-510*, 549 F.2d 407 (6th Cir. 1977) (clause conflicting with arbitration clause subject to resolution through grievance procedure). See also *Francesco's B, Inc. v. Hotel and Restaurant Employees Local 28*, 659 F.2d 1383, 1388 (9th Cir. 1981) (proper for court to let arbitrator determine arbitrability).

[10] Nor have the courts always been consistent as to the meaning of the word strike or other forms of work interruption. See *Jessop Steel Co. v. United Steel Workers*, 428 F. Supp. 172 (W.D. Pa. 1977) and *12th & L. Ltd. v. Local 99-99A I.U.O.E.*, 398 F. Supp. 1174, 1177 (D.D.C. 1975).

Union, 345 F2d 757 (9th Cir. 1965).[11] Had the district court found that any part of the activity of Local 70 was not a "strike" subject to Article 8(d), then it would have stayed the proceedings arising out of those activities.

Fourth, we argued that there were two provisions in the NMFA mandating that the National Grievance Committee would decide the arbitrability of any grievance: Art. 8(g) and 8(f), App. I. The court rejected the argument on the theory that the question of arbitrability may only be decided by the grievance committee if the contract makes it "explicitly" clear that the parties have so agreed. App. A, Note 5. Although arguably these provisions included the arbitrability question, the court reasoned that a reversal of the normal presumption in favor of arbitrability is warranted where Local 70 asserted that those questions should be resolved in the grievance procedure. It is not hard to locate the source of confusion as to the appropriate standard to be applied. In *dicta*, this Court suggested that it requires a "clear demonstration" of an intent by contracting parties to permit the question of arbitrability to be decided by the arbitrator. *United Steelworkers v. Warrior & Gulf Navigation Co., supra*, at n.7. Yet, since then the courts have recognized that the parties may agree to remand questions of arbitrability to their grievance procedure without applying that burden.[12] The standard adopted by the court below is an express reversal of the normal burden in which the party resisting arbitration must convince the court that "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation which covers the asserted dispute." *Id.* at 582-83.

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[11] See cases cited at footnote 5, *supra*.

[12] See *Amalgamated Clothing and Textile Workers Union v. Ratner Corp.*, 602 F.2d 1363, 1368, 1370 (9th Cir. 1979); *Teamsters Local Unions v. Braswell Motor Freight Lines, Inc.*, 392 F.2d 1, 6, n.6, *modified*, 395 F.2d 655 (9th Cir. 1968); but *cf. Metal Product Workers Union 1645 v. Torrington Company*, 358 F.2d 103, 105 (2d Cir. 1966).

Each of the issues was raised in the district court and then to the court of appeals. In each case, the courts interpreted the contract and rejected petitioner's requests that the matter be treated through the parties' grievance procedure.

As we have shown above, the Steelworkers Trilogy and subsequent cases have left unresolved the question of whether a court, or the arbitrator, should determine the arbitrability of a grievance where that question is decidedly one of interpretation of the provision in the labor agreement. It is time that that issue be resolved consistent with the presumption of arbitrability so as to require such questions to be normally decided by the arbitrator and not the court.

VI

IF EXHAUSTION OF CONTRACTUAL REMEDIES IS JURISDICTIONAL TO A CLAIM ALLEGING A VIOLATION OF A COLLECTIVE BARGAINING AGREEMENT, THEN THE UNION'S ARGUMENT REGARDING THE INTERPRETATION OF ARTICLE 8(d) COULD BE RAISED ON APPEAL

We made one argument that the court below rejected because of Local 70's litigation posture. After determining that the 1967-70 NMFA governed during the period up to May 17, 1970, it read one sentence in Art. 8(d) to permit employer damage claims to proceed: "Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement." The Ninth Circuit agreed with our contention that normally the interpretation of that sentence is one in which the usual "presumption of arbitrability would require the district court to defer to the arbitrator for an interpretation of the words 'strike' and 'in violation of this Agreement'." App. A note 10.

The court rejected our argument because Local 70 had alleged "that it was not bound by the 1967-1970 collective bargaining agreement" (App. A p. 28) and, therefore, "repudiated" its obligations before the court. The court was dead wrong. The Union's position was that, although bound by *that* agreement through March 31, 1970, the Union was not bound by the new agreement effective thereafter. That was what the strike was all about, as well as the collateral litigation before the NLRB.[11] The district court was never confused in this regard. App. C pp. 28-29. Nor did the district court think the Union had waited too long to raise this defense: "[The court] does note that the delay in this case is not likely to disrupt the proceedings to the degree that would, in the court's opinion, justify denial of arbitration on that ground alone." App. D p. 33. Nor was the trial judge unaware of Local 70's position that the meaning of Article 8(d) was reserved for the Grievance Committee for he stated, seemingly exasperated with our repetitive motions:

> "On January 25, 1974, it held that arbitration was not required by the 1967-70 Master Agreement because Article 8(d) of that Agreement specifically permitted suits where strikes were involved. On March 22, 1974,

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[11] See n.1, *supra*.

> the court refused to certify this issue for immediate appeal under 28 U.S.C. section 1292(b) . . . Defendant now seeks essentially to reverse that ruling, relying on the presumption of arbitrability and claiming that damage claims arguably not within the exception to that grievance exhaustion requirement contained in Article 8(d) and that the question of *whether they are within that exception should be arbitrated.*" App. G pp. 1-3 (Emphasis supplied).

Assuming even some merit to the court of appeals' view of the record, would Local 70 have been able to raise the issue at any time in light of the settled doctrine that any jurisdictional issue may be raised at any time during the litigation, either by a party, or by the court. *King Bridge Co. v. Otoe County*, 120 U.S. 225 (1897)? In *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965), and *Andrews v. Louisville & Nashville RR*, 406 U.S. 320 (1972), this Court has made it clear that an individual worker must exhaust the contractual remedy, otherwise dismissal is mandated. Similarly, where a union fails to exhaust a contractual grievance procedure, a court lacks jurisdiction. *California State Council v. Associated General Contractors*, 648 F.2d 527, 539 (9th Cir. 1980) *cert. granted on other issues*, ... U.S. ...... (1981). On the other hand, with respect to employers' claims against unions, confusion governs in the courts as to the proper disposition.[14]

If our theory is correct that the exhaustion of contractual remedies by any party to a collective bargaining agreement is jurisdictional to a claim in the district court on the same theory, then there is no difference when the issue is raised. This Court is compelled to resolve the question of whether exhaustion of contractual remedies by an employer is jurisdictional or not, so as to require employer grievances to be treated identically with union grievances.

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[14] Compare *Pilot Freight Carriers v. Teamsters*, 659 F.2d 1252, 1259 (4th Cir. 1981) (dismissal of claim), with *Hardline Electric v. I.B.E.W.*, 1547, 680 F.2d 620, 627 (1982) (remanding "for stay or dismissal") and *Drake Bakeries v. Bakery Workers*, *supra* (stay).

VII

WHERE THERE IS NO PROVISION FOR FINAL AND BINDING ARBITRATION, THERE IS NO IMPLIED NO-STRIKE OBLIGATION

In *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 965 (1962), this court held that where a collective bargaining agreement provides for final and binding arbitration, any grievance encompassed by that arbitration clause may not be the subject of strike action.

The grievance procedures contained in the NMFA and the JC 7 Supp. specifically prohibit arbitration of any dispute, for the grievance procedure is composed of a series of multi-level joint committees composed equally of employer and union representatives. There is no necessary finality to any grievance processed through that procedure. This is a grievance procedure for resolution of disputes as distinguished from arbitration because of its lack of finality. *NLRB v. C. & C. Plywood Corp.*, 385 U.S. 421, 429 (1967) and *Hoover Motor Express Co. v. Teamsters Local 327*, 217 F.2d 49, 53 (6th Cir. 1954).[18]

When this Court enunciated the *Lucas Flour* doctrine it did not determine that the existence of a grievance procedure absent such finality invoked the same implied no-strike obligation. Indeed, this Court subsequently recognized that that issue has been left open. See *Chauffers, Teamsters and Helpers Local Union No. 795 v. Yellow Transit Freight Lines*, 370 U.S. 711 (1962). The court below avoided this precise question by generalizing that any grievance procedure is "arbitration" without reaching the question of whether a necessary part of arbitration is finality.[18] App. A. p. 36-38.

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[18] In another context, the lack of finality is a decisive factor. *Associated General Contractors of Illinois v. Teamsters*, 486 F.2d 972 (7th Cir. 1973).

We submit that this is an appropriate case in which to resolve that important issue because of the large number of collective bargaining agreements which preclude binding arbitration and rely on the joint committee system.

VIII

WHERE A UNION STRIKES OVER THE TERMS AND CONDITIONS OF EMPLOYMENT, DOES AN IMPLIED NO-STRIKE OBLIGATION EXIST WHERE THE MATTER IS NOT RESOLVABLE THROUGH THE GRIEVANCE PROCEDURE

As we have noted above, there is a substantial question as to whether the *Lucas Flour* doctrine is applicable because the contract lacks a provision for "final and binding arbitration". 369 U.S. at 106. As we shall show in this portion of our petition, the second prong of the *Lucas Flour* doctrine is lacking: whether the strike was undertaken over an issue which "it has been agreed will be covered by compulsory terminal arbitration." *Id* at 106.

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[18] If a joint committee does not deadlock and issues a majority decision, that decision has one attribute of "arbitration": finality and enforceability. *General Drivers v. Riss and Co.*, 372 U.S. 517 (1963).

The court below recognized that the cause of the strike was local 70's dissatisfaction with the course of bargaining and resulted in local 70's efforts to break away from the multi-employer bargaining group.

This Court cautioned in *Lucas Flour* that the doctrine does not "suggest [that] a no-strike agreement is to be implied beyond the area which it has been agreed will be covered by exclusive compulsory terminal arbitration." *Id.* See also *Buffalo Forge Co. v. United Steel Workers*, 428 U.S. 397 (1976).

It takes no extensive discussion to demonstrate that a union's efforts to force an employer to agree to different terms and conditions of employment is decidedly not a grievable matter but one which may be resolved only through negotiations. *West Texas Utilities Co., Inc. v. N.L.R.B.*, 206 F.2d 442, 446 (D.C. Cir. 1953), *cert. denied*, 346 U.S. 855 (1953).[17] The court read far more into the grievance procedure than is proper when it stated "It is doubtful that under the language of the agreements there was any room for stoppage in the absence of prior arbitration." App. A. p. 36. We believe that the implications of the court's holding are preposterous. Nothing would suggest that the Union *could* grieve its claim for higher wages and different benefits. Moreover, it clashes with the doctrine that "[w]here there has been no express waiver of the right to strike, a waiver of the right . . . is not to be inferred." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 293 (1957).

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[17] This precise distinction exists under the Railway Labor Act, 45 U.S.C. § 15 *et seq*. See *Elgin, Joliet & Eastern R. Co. v. Burley*, 325 U.S. 711, 722-23 (1945) and *Railway Employees v. Florida East Coast R. Co.*, 384 U.S. 238-40 (1961).

In light of the doctrine that courts are not to regulate the permissible free play of economic force, it was improper to imply a no-strike obligation beyond those disputes which *are* resolvable through a grievance procedure. This is a compelling opportunity to clarify the *Lucas Flour* doctrine.[18]

IX

THE COURT COULD NOT IGNORE THE INTERPRETATION OF A CONTRACT SETTLED THROUGH A FINAL DECISION OF THE NATIONAL GRIEVANCE COMMITTEE

The first two days of the strike in April were conducted before the national bargaining committees settled on a new agreement. In order to find any no-strike pledge, the court read Art. 37, sec. 3, to infer a no-strike obligation until *impasse* in negotiations occurs. The provision states "The respective parties shall be permitted all legal or economic recourse to support their requests for revisions if the parties fail to agree thereon." Since the bargaining continued on those two days without impasse, the court held that no strike could be conducted.

We contended that the phrase had the contrary meaning. Strike or lockout was permitted *until* a new agreement was reached. The court's equating "failure to agree" with "impasse" violated three settled principles: (1) It implied a no-strike pledge where none existed; (2) It interfered with the parties' ability to resolve bargaining position through forces of economic contention; and (3) misread the meaning of "impasse", which is decidedly different from a failure to agree.

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[18] The ruling of the Ninth Circuit is in conflict with four other courts: *Emery Air Freight Corp. v. Local Union* 295, 449 F.2d 586, 591 (2d Cir. 1971), *cert denied*, 405 U.S. 1066 (1972); *Automobile Transport, Inc. v. Ferdnance*, 420 F.Supp. 75, 77 (E.D. Mich. 1976); *Coordinating Committee v. United Steelworkers*, 436 F.Supp. 208, 215 (W.D. Pa 1977); and *Best Cranes, Inc. v. Local 139 I.U.O.E.*, 93 LRRM 2994 (E.D. Wisc. 1976). See also *Iodice v. Calabrese*, 512 F.2d 383, 389 (2d Cir. 1975).

More compelling is that the parties have in a National Grievance Committee decision construed precisely this provision to permit economic action without impasse. See App. H. Although we think the clearly erroneous analysis of the phrase is so detrimental to settled principles of labor law that a hearing should be granted on that ground alone, another important point needs clarification. It is a point that is involved in a case presently pending before this court: *W. R. Grace and Co. v. Rubber Workers*, No. 81-1314 (*cert granted* June 28, 1982).[19] The question is whether a court may totally disregard the parties' definitive understanding of a contract as expressed in a joint grievance committee decision.[20]

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[19] See also *OCAW, Local 4-16000 v. Ethyl Corp.*, 644 F.2d 1044 (5th Cir. 1981).

[20] That award was enforced by the United States District Court for the Northern District of California in an unpublished decision in case Nos. C-76-661 and C-77-2626-RHS. See also *Western Conference of Teamsters v. Ringsby Truck Lines*, 676 F.2d 383 (9th Cir. 1982).

X

THE UNION'S NO-STRIKE PLEDGE RUNS ONLY TO ITS MEMBERS IN UNITS COVERED BY ITS COLLECTIVE BARGAINING AGREEMENT

A significant portion of the damages in this case were assessed because of picketing by Local 70 outside of its contractual jurisdiction (primarily in San Francisco) and at manufacturing facilities where employees outside of Local 70's bargaining unit respected the picket lines. As to those employees, the picketing was clearly sympathy or stranger picketing, *Buffalo Forge Co. v. United Steelworkers, supra;* since there was no contractual obligation on the part of Local 70 not to cause work stoppages.

Since *Buffalo Forge,* the courts have inconsistently treated sympathy strikes once damage issues arise. "Damage Remedies for Sympathy Strikes After *Buffalo Forge,"* 78 Colum.L.R. 1664 (1978). Here the issue is squarely posed.[21] Absent a "clear and unmistakable" contractual waiver of a union's right to cause work stoppages outside of its jurisdiction, the Union's actions in picketing other facilities cannot cause liability under section 185. *NLRB v. Southern California Edison,* 646 F.2d 1352, 1365-66 (9th Cir. 1981); *Delaware Coca-Cola Bottling Co. v. General Teamster Local 326,* 624 F.2d 1182, 1184 (2d Cir. 1980). In *Eazor Express, Inc. v. I.B.T.,* 520 F.2d 951, 956 (3d Cir. 1975), *cert. denied,* 424 U.S. 935 (1976), the court recognized exactly this proposition where the union's underlying strike was unlawful.

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[21] The Union does not challenge that it was responsible for the May strike notwithstanding the involvement of the Los Angeles wildcat strikers. We are, therefore, not raising the issue of whether the Union could be properly held liable for those strikes as "sympathy strikes."

This Court is left with a precise legal issue: Absent a "clear and unmistakable waiver" of a union's right to picket outside of its collective bargaining unit by engaging in stranger picketing, can contractual damages be assessed?

CONCLUSION

This case presents a myriad of important labor law issues. Had the district court followed the Union's repeated requests that this matter be stayed or dismissed while the employers' claims proceeded through the grievance procedure, neither the district court nor the court of appeals would have become entangeled in interpreting these complicated collective bargaining agreements.

For the reasons suggested above, this Court should grant this petition and set this case for oral argument.

Dated: August 30, 1982

Respectfully submitted,

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FILED
AUG 31 1982
ALEXANDER L. STEVAS,
CLERK

82-363

No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70,
Petitioner,

VS.

CALIFORNIA TRUCKING ASSOCIATION, et al.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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F I L E D
OCT 19, 1981

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING)
ASSOCIATION,)
Plaintiff-Appellee,)
) NO. 77-3445
v.)
)
BROTHERHOOD OF TEAMSTERS)
& AUTO TRUCK DRIVERS,)
LOCAL 70,)
Defendant-Appellant.) **OPINION**
)
GRANNY GOOSE FOODS, INC.,)
et al.,)
Plaintiffs-Appellees,)
)
v.)
)
BROTHERHOOD OF TEAMSTERS)
& AUTO TRUCK DRIVERS,)
LOCAL 70,)
Defendant-Appellant)
)

Appeal from the United States District
Court for the Northern District
of California
Argued and Submitted
September 10, 1980

Before: ELY and TANG, Circuit Judges,
and GRANT*, District Judge.

TANG, Circuit Judge:

This is an action arising under section 301 of the Labor Management Relations Act, 29 U.S.C.§ 185 (1976), to recover damages caused by a claimed violation of a collective bargaining agreement. Brotherhood of Teamsters & Auto Truck Drivers, Local 70 [Local 70] appeals the district court's judgment determining Local 70's liability in damages for breach of the collective bargaining agreement running between it and the employers, California Trucking Association and two manufacturing concerns, Granny Goose Foods, Inc. and Sunshine Biscuit, Inc. [the employers]. Although each issue spawns several sub-issues, the appeal can be reduced to three central questions: (1) whether the district court erred in entertaining the employers' damage actions instituted without prior resort to grievance procedures contained in the collective bargaining agreement; (2) whether the district court erred in its determination that each work stoppage litigated was in breach of the agreement; and (3) whether the damage formulae adopted by the lower court were erroneous. We hold that the district court had jurisdiction over the employers' damage action because Local 70 repudiated its agreement in proceedings before the lower court. We also hold that the court correctly determined that the work stoppages were in breach of the agreement. We affirm the district court's computation of damages save and except as to the issue of lost customers. Because the trial court failed to determine whether overhead should be deducted from projected lost gross profits, on that issue we reverse and remand.

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* The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

I

FACTS

On April 1, 1967, the parties entered collective bargaining agreements entitled "National Master Freight Agreement" (NMFA) and "Local

70 Pickup and Delivery Supplemental Agreement" (Supplemental Agreement). The court below found that although the agreements ostensibly bound the principals for the term April 1, 1967 to March 31, 1970, Article 61 of the Supplemental Agreement provided that the term of the agreement was subject to and controlled by all the provisions of Article 37 of the National Master Agreement which in turn allowed annual extensions of the agreements absent notice by any of the parties to the contrary.[1/] The trial court also found that the 1967-1970 contracts were in effect during the period April 1, 1970, to May 18, 1970 (representing an extension of the original agreement by nearly two months) because neither

side proffered notice of intent to discontinue the contracts.

Pursuant to section 2 of Article 37 of the NMFA, however, the parties took steps to amend the contracts in early 1970.[2/] These negotiations proceeded without impasse until a tentative agreement was achieved on April 2, 1970. The agreement was consummated when the union acquired the requisite ratification of the full membership of teamsters on May 18, 1970.

The district court found that under the terms of the contract only the monetary items contained in the agreement would have retroactive effect to April 1, 1970. In contrast, the court's interpretation of the agreement specifically disallowed retroactivity as to the nonmonetary language of the contract. Those provisions were found to be prospective only, dating from May 18, 1970, the date of ratification. The nonmonetary terms of the 1967-1970 contract, consequently, were deemed to be effective during the interim period, April 1, 1970 to May 18, 1970.[3/]

Although no impasse had been reached in the negotiations for the amendments to the contracts, Local 70, disenchanted with national negotiations and in apparent pursuit of a separate contract, initiated strike and picket activity against the trucking plaintiffs on or about April 1, 1970. As a consequence of a temporary restraining order issued by the Superior Court of Alameda County, the picketing ceased on April 4, 1970. Because of a mass "sick-in" executed on April 6 and 7, however, the work stoppage did not cease until April 8, 1970. Local 70 reinstated its work stoppage against the trucking association on May 8, 1970, and expanded the activity on May 14, 1970, to encompass the snack food industry plaintiffs, Granny Goose and Sunshine Biscuits. The work stoppages against the employers, which did not fully terminate until June, resulted in a complete cessation of virtually all revenue-producing operations during the period of the work stoppage.

Both the trucking association and the snack food plaintiffs' claims were removed from Alameda Superior Court to the United States District Court for the Northern District of California and there consolidated. After the claims were removed and consolidated, the trucking plaintiffs filed an unfair labor practice charge against Local 70 based on the April and May events. As an upshot of the filing, the National Labor Relations Board (the Board) issued complaint against the union. The NLRB trial examiner found that Local 70's April and May activity had violated the NLRA as an attempt to break the employers away from the multi-employer bargaining unit. The union's appeal to the

NLRB was unsuccessful and its subsequent noncompliance with the NLRB order was countered by this court's judgment enforcing the Board's order.[4/] The union later moved in district court for dismissal of the consolidated actions but the court denied the motion. Although the district court stayed proceedings with respect to claims arising on or after May 18, 1970, it conducted trial without jury as to the earlier claims, and found Local 70 liable in damages in excess of three million dollars. From that disposition, Local 70 appeals.

II

STANDARD OF REVIEW

We must first determine whether

the district court erred in holding that the employers could maintain a damages action under section 301 in lieu of arbitration. Review of this issue must begin with the language of the collective bargaining agreement.

Section 8(d) of the NMFA provides that:

> In the event of strikes, work stoppages, or other activities which are permitted in a case of deadlock, default or failure to comply with majority decisions, no interpretation of this agreement by a tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation. Nothing herein shall prevent legal proceedings by the employers where the strike is in violation of this agreement (emphasis added).

The employers contend that this language permits a damages action in district court without prior resort to arbitral grievance procedures. Local 70 disputes this contention, arguing that arbitration is a condition precedent to an action in district court. In turn, the employers argue that even if Local 70's assertions are correct, it cannot now rely on grievance procedures it expressly repudiated in pleadings and motions before the district court.

Specifically, Local 70 argues that two provisions in the NMFA require arbitration prior to suit in district court. First, Local 70 argues that the word "herein" in section 8(d) of the NMFA is referable only to the NMFA and not its Supplemental Agreements. As a consequence, argues Local 70, the district court could not ignore the mandatory grievance procedures enumerated in the Supplemental Agreement. Second, Local 70 contends that the words "strike" and "in violation of this agreement" must first be construed before suit can be brought in district court and that only the arbitrator can determine the significance of the contested language. Resolution of these two questions hinges initially on a purely legal issue--whether the district court has the power to determine the existence and scope of a contract to arbitrate.

A.

[1-4] The Supreme Court has repeatedly held that, absent a

contrary provision in the collective bargaining agreement, the existence and scope of a contract to arbitrate are questions for the court to determine in the first instance:

> The Congress* * * has by §301 of the Labor Management Relations Act, assigned the courts the duty of determining whether the reluctant party has breached his promise to arbitrate. For arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.

United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S.574, 582, 80 S.Ct. 1347, 1352, 4L.Ed.2d 1409 (1960). Under the court's decisions, whether or not the parties are bound to arbitrate, as well as what issues they must arbitrate, is a matter to be determined by the court on the basis of the contract entered into by the parties. Atkinson v. Sinclair Refining Co., 370 U.S.238, 241, 82 S.Ct. 1318, 1320, 8 L.Ed.2d 462 (1962). See International Union of Operating Engineers v. Flair Builders, Inc., 406 U.S.487, 491-92, 92 S.Ct. 1710, 1712-1718, 32 L.Ed.2d 248 (1972); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547, 84 S.Ct. 909, 912, 11 L.Ed.2d 898 (1964); Local Freight Drivers v. Braswell Motor Freight Lines, Inc., 422 F.2d 109, 112 (9th Cir.), cert. denied, 400 U.S.827, 91 S.Ct. 53, 27 L.Ed.2d 56 (1970). Consequently, a determination that the collective bargaining agreement permits a damages action in district court in lieu of arbitration is well within a district court's power. See Atkinson, 370 U.S. at 241-42, 82 S.Ct. at 1320-1321, (1962); Johnston-Tombigbee Furniture Mfg. Co. v. United Brotherhood of Carpenters and Joiners, 596 F.2d 126, 128-129 (5th Cir. 1979); Howard Electric Co. v. International Brotherhood of Electrical Workers, 423 F.2d 164, 165-66 (9th Cir. 1970); Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products Union, 345 F.2d 757, 759 (9th Cir. 1965); Stokely-Van Camp, Inc. v. United Steel Workers of America, 480 F.Supp. 48 (E.D.Tenn. 1979). The district court in this case clearly had jurisdiction to determine the existence and scope of the contract arbitrate.[5/]

B.

Having properly exercised jurisdiction to determine the scope of the collective bargaining agreement, the court below held that it could entertain the employers section 301 damages action because: (1) section 8(d) permitted "legal proceedings by the employer" when "the strike is in violation of this agreement"; and (2) in any event, Local 70 repudiated its rights and obligations under the collective bargaining agreement, thereby waiving its right to compel arbitration prior to suit in district court. We turn first to the lower court's second holding.

In rendering judgment, the district court held that even if the collective bargaining agreement required submission of damages actions to the grievance procedures, Local 70's express repudiation of the collective bargaining agreement released the employers from any obligation to arbitrate. Specifically, the court found that Local 70 consistently repudiated the entire collective bargaining agreement by denying throughout proceedings before the court that it was bound by the agreement.[6/] Before determining whether an adequate factual base supports its findings of subsidiary facts, we examine the district court's conclusion that it had jurisdiction to resolve the question of repudiation.

[5] Although there has been some confusion in the past, it is now settled that the issue whether repudiation has occurred must normally be submitted to arbitration when the contract calls for arbitral resolution of questions arising under the collective bargaining agreement. Rochdale Village, Inc. v. Public Service Employers Union, 605 F2d 1290, 1297 (2nd Cir. 1979); Auto, Marine & Specialty Painters v. Bay Area Sealers, Inc., 577 F.2d 609, 210 (9th Cir. 1978); H & M Cake Box, Inc. v. Bakery & Confectionery Workers International Union, 493 F2d 1226, 1231 (1st Cir.), cert. denied, 419 U.S.839, 95 S.Ct. 68, 42 L.Ed.2d 66 (1974). But cf. Brannon v. Warn Bros., Inc.,

508 F.2d 115, 120 (9th Cir. 1974) (repudiation by employees is normally question for court to resolve) (citing *Vaca v. Sipes*, 386 U.S. 171, 185, 87 S.Ct. 903, 914, 17 L.Ed.2d 842 (1967)). Nevertheless, at least one court has carved an exception to the general rule favoring the presumptive arbitrability of repudiation questions. In *Reid Burton Constr., Inc. v. Carpenters Dist. Council*, 535 F.2d 598, 602-04 (10th Cir.), *cert. denied*, 492 U.S. 907, 97 S.Ct. 272, 50 L.Ed.2d 188 (1976), *appeal from remand*, 614 F.2d 698, 700-02 (1980), the Tenth Circuit reasoned that a distinction must be demarcated between repudiations arising before the arbitrator or during the course of a

contractual relationship and repudiations occurring in proceedings directly before a court. The court in Reid Burton held that the district court, not the arbitrator should rule on the question of repudiation when the asserted rejection of the contract occurs before the court.

In response to an employer's section 301 damages action for breach of a collective bargaining agreement, the union in Reid Burton claimed that it was not a party to the agreement and counterclaimed, claiming that the employer had failed to exhaust the mandatory arbitral procedures. Despite this latter contention, the union consistently denied before the district court its status as a party to the employer's damages action for more than a year, although it participated in numerous hearings, pretrial conferences, motions and other pleadings. Moreover, the union failed to demand enforcement of the collective bargaining agreement's arbitration clause. Reid Burton, 614 F.2d at 703. The employer, in turn, claimed that the union's conduct constituted a repudiation of the collective bargaining agreement and its arbitration procedures, thereby freeing it from any obligation to pursue the arbitral grievance machinery. Id.

The Tenth Circuit in Reid Burton commenced its analysis of this question by reviewing appropriate precedents, focusing primarily on the Supreme Court's opinion in International Union of Operating Engineers v. Flair Builders, Inc., 406 U.S. 487, 92 S.Ct. 1710, 32 L.Ed.2d 284 (1972). After carefully examining that case, the court concluded that Flair Builders could be "confined to the proposition that certain broadly-worded arbitration clauses require the arbitration of equitable defenses arising out of the formation of a collective bargaining agreement or the processing of a grievance, be they intrinsic procedural questions or extrinsic questions ...." Reid Burton, 535 F.2d at 603 (footnote omitted). Under this construction, concluded the Reid Burton court, not every question concerning equitable defenses must be relegated to arbitration:

> The equitable defense ... arose from alleged "evasive" and "dilatory" pleading tactics by the unions in the district court proceedings, specifically the fact that the unions claimed that Local 1340 was not a party to the collective bargaining agreement, later admitting that while Local 1340 was not a party it was still bound by the provisions of the agreement. Courts must, of course, maintain judicial control of their own proceedings. Such power, we assert, is broad enough to include a court's determination of the validity of equitable defenses arising out of the action of parties before the court. To hold otherwise would unnecessarily hamper a court's control of its proceedings.

Reid Burton, 535 F.2d at 603. The court also concluded that even if the litigants agreed to refer the question of such repudiation to arbitration, jurisdiction would still be proper only in district court because the parties' prerogative to contract could not encompass the power to limit directly the exercise of a court's inherent judicial function. Reid Burton, 535 F.2d at 604.

[6] We have found substantial support in both state and federal court decisions for the Tenth Circuit's conclusion.[7/] Moreover, we find the reasoning that underpins the holding in Reid Burton compelling. Maintenance of control and supervision over court proceedings is an inherent judicial function that surely includes the power to determine the validity of equitable defenses arising from the parties' conduct before the court. We therefore adopt the limited exception

to arbitrability fashioned in Reid Burton. Accordingly, we affirm the district court's conclusion that it had jurisdiction to resolve a repudiation defense based on conduct occurring before it.

C.

Our determination that the trial court had jurisdiction over the repudiation issue does not conclude our inquiry, however, for we must also review the court's holding that Local 70's conduct constituted repudiation. We conclude that the court correctly applied the principles of repudiation, waiver and estoppel and that its finding of fact were not clearly erroneous.

[7] As the trial court correctly observed, the effect of a repudiation upon the repudiator's right to arbitration is contingent on the character of the alleged repudiation and the reasons offered in justification:

> One who flatly repudiates the provision for arbitration itself should have no right to the stay of a court action brought by the other party. But mere nonperformance, even though unjustified, is not per se a 'repudiation.' One who asserts in good faith that the facts justify him in refusing performance of other provisions in the contract should not thereby lose his right to arbitration that he would otherwise have had. There is no inconsistency in his demanding arbitration at the same time that he asserts his legal privilege not to proceed with performance.

Drake Bakeries, Inc. v. American Bakery & Confectionery Workers

International, 370 U.S. 254, 263 n.10, 82 S.Ct. 1346, 1351, 8 L.Ed.2d 474 (1962) (quoting 6 Corbin, Contracts § 1443, at 192-93 n.34 (1961 Supp.)) (emphasis added). Thus, a determination on the issue of repudiation will often entail an examination of the repudiator's manifest intent to preserve a pre-existing contractual right to arbitrate as an alternative to contractual repudiation.

In this case, Local 70 answered the employers' complaint with the affirmative defense that it was not bound by the 1967-1970 collective bargaining agreement, the same agreement it now points to as expressing its right to insist upon arbitration.

Local 70 did not assert a right to arbitration in a timely manner. Instead, it argued before the court that it preferred to have the action determined in a speedy trial. Local 70 also delayed over three years before moving the court to dismiss the lawsuit on the ground that the employers had failed to exhaust contractual grievance procedures and delayed an additional year until the day the trial was originally scheduled to commence before requesting a stay. Moreover, neither the motions for dismissal nor the motion for stay alleged that the provisions in the 1967-1970 agreement it now relies upon required arbitration.[8/] On the contrary, it would be reasonable to infer from

Local 70's motions that it desired trial to the exclusion of an arbitral interpretation of the agreement.[9]

[8] The record shows that Local 70 failed timely to inform the employers and the district court of its position that the agreement required that the dispute be arbitrated. Under these circumstances we must affirm the district court's finding of repudiation. To hold otherwise would condone an inordinate, prejudicial delay. During Local 70's delay of over four years in filing its motion for stay, it substantially invoked the litigation machinery by submitting several motions for summary judgement on the merits. Both the court and the employers were led to believe that

Local 70 was content to take the matter to trial. Moreover, even if we could assume that Local 70's motion for stay pending arbitration was timely, its request did not raise the defense it now asserts on appeal. Local 70 did nothing to modify the origianl unequivocal repudiation it expressed in its answer.

Accordingly, we affirm the district court's conclusion that Local 70 repudiated its contract status and is estopped from relying on the arbitration provisions as a defense to the employers damages action arising out of the 1967-1970 agreement. See Reid Burton, 614 F.2d at 702-03 (collecting cases); cf. Controlled Sanitation Corp. v. International

Assoc. of Machinists & Aerospace Workers, 524 F.2d 1324, 1326 n.3 (3rd Cir. 1975), cert. denied, 424 U.S. 915, 96 S.Ct. 1114, 47 L.Ed.2d 319 (1976) (union not estopped when it pled inapplicability of collective bargaining agreement but specifically reserved right to proceed with arbitration if contract did apply). Because Local 70 is estopped from relying on the grievance procedures in the NMFA and the Supplemental Agreement, we need not review its contention that the arbitrator, rather than the district court, should have interpreted section 8(d).[10]

III

Local 70 argues that the district court erred in holding the

April and May work stoppages violative of the collective bargaining agreement. We have reviewed the district court's findings of fact and conclusion of law on these issues and conclude that we must affirm.

A.

The court below found that Article 8 of the NMFA and Article 42 of the Supplemental Agreement required arbitration for all grievances or questions of interpretation arising under the contracts and all grievances or controversies affecting the mutual relations of the parties. Article 8 of the NMFA provides:

> All grievances or questions of interpretation arising under this Master Agreement or Supplemental Agreements thereto shall be processed as set forth below. (emphasis added).

Article 42 of the Supplemental Agreement states that "any grievance or controversy affecting the mutual relations of the employer and the union shall first be taken up between the local union and the individual employer involved" and if the matter is not resolved, it "shall be referred to the Joint Council 7 Labor Management Committee" (emphasis added).

Because Local 70 struck in April, the court found that Local 70 had violated the implied no-strike duty first recognized in Teamsters, Chauffeurs, Warehousemen & Helpers v. Lucas Flour Co., 369 U.S. 95, 82 S.Ct. 571, 7 L.Ed.2d 593 (1962). Local 70 does not challenge the court's interpretation of the language in Articles

8 and 42 but rather mounts an attack on the district court's determination that a relevant implied no-strike obligation existed and that the only exception to Local 70's adherence to the obligation was the existence of a bona fide impasse.

[9] Local 70 first contends that it struck over "terms and conditions of employment," thereby circumventing the scope of the admitted implied no-strike obligation. This claim is spurious. The court below concluded on the basis of ample evidence that the union was motivated by concerns which were clearly circumscribed by the no-strike provision.[11] Its conclusion is not clearly erroneous. Local 70 does not directly

refute these findings. Moreover, it is doubtful that under the language of the agreements there was _any_ room for stoppage in the absence of prior arbitration. As our quotation of the NMFA and Supplemental Agreement indicates, the uncontested language of the relevant contract provisions is all-inclusive. _See Auto, Marine & Specialty Painters_, 577 F.2d at 610-11 ("all disputes and grievances" comprehends defense of laches); _cf. Rochdale Village_, 605 F.2d at 1296 ("any and all dispute hereunder" excludes disputes collateral to agreement).

[10] Local 70 next contends that the _Lucas Flour_ implied no-strike principle is inapplicable because there is no express provision in the

agreements denominating the grievance procedures as "final and binding arbitration." The lower court, however, correctly held that the presence of such an express appellation is irrelevant when the parties' intent indicates a desire fully to arbitrate. General Drivers, W&H v. Riss and Co., 372 U.S. 517, 518-520, 83 S.Ct. 789, 790-791, 9 L.Ed.2d 918 (1963); Santos v. District Council of New York City & Vicinity of United Brotherhood of Carpenters & Joiners, 547 F.2d 197, 201 n.5 (2nd Cir. 1977); Warren v. International Brotherhood of Teamsters, 544 F.2d 334, 340 (8th Cir. 1976); Braswell Motor Freight Line, 422 F.2d at 112-113; Truck Drivers & Helpers Local Union v. Georgia Highway

Express, Inc., 328 F.2d 93, 94-96 (5th Cir. 1964).

[11] Local 70 also argues that even if the agreement contained an implied no-strike provision, it was excused from that obligation by an independent contractual provision, Article 37 of the NMFA. Under that provision "the respective parties shall be permitted all legal or economic recourse to support their requests for revisions if the parties fail to agree thereon." (emphasis added). The trial court equated the phrase "fail to agree" with the term "impasse" and found that there was no impasse prior to the institution of the work stoppages. Local 70 does not dispute the absence of impasse;

rather, it emphasizes the distinction between "fail to agree" and "impasse". Local 70 argues, contrary to the lower court's ruling, that "fail to agree" connotes a far lower standard of disagreement than "impasse". Under the "fail to agree" standard proposed by Local 70, minor preliminary disagreement could justify economic sanctions. We have been unable to uncover any court decisions supporting Local 70's viewpoint.[12]

On the other hand, *Motor Carriers Council, Inc. v. Local Union No. 600*, 486 F.2d 650, 652 (8th Cir. 1973), the principal authority relied on by the trial court, resolves the precise question at issue here in the context of a substantially identical collective bargaining agreement. The court in that case affirmed the lower court's contention that if "fail to agree" was not equivalent to "impasse," parties could always "fail to agree" upon the commencement of negotiations, thereby nullifying the arbitration provisions. Id. at 652-53; cf. Newspaper Production Co. v. NLRB, 503 F.2d 821, 825 (5th Cir. 1974) (casually noting a rough equivalence between "impasse" and "failure to agree"). Beyond the sound logic advanced by the Eighth Circuit in Motor Carriers, it should be apparent that the meaning claimed by Local 70 would be better captured by the word "disagree". "Fail to agree" suggests that an attempt is made to "agree",[13/]

whereas it could be argued that the word "disagree" would retain its full import without any attempt at mediation.[14/]

B.

Local 70 asserts that its mass observance of picket line activity conducted by Local 208 union members from Los Angeles was an insufficient predicate for the trial court's award of damages to the employers. Noting that the trial court had labeled the picket lines "unlawful," Local argues that the trial court impermissibly focused on the nature of the picketing, rather than on the contractual relationship extant between Local 70 and the employers.

[12,13] Local 70's argument either misconstrues or misrepresents the primary direction of the trial court's attention. Although the court gratuitously stated that "the mass honoring of the illegal picket line ... was not protected by Article 9 of the Master Agreement ...," the legality of the picket line was not at the core of the trial court's determination. The damages award was based on clear evidence that, far from respecting stranger pickets, Local 70 actively encouraged and aided Los Angeles union members in their picketing. As the union suggests, "[i]f Local 70 had invited the pickets from Los Angeles, had made demands upon each one of the employees

involved herein that they sign separate agreements, had taken an active role in ordering its men not to work, and had made an effort to ensure that other unionized members not work, there might be some credence to the plaintiff's claim." The evidence offered at trial factually establishes such liability.[15/] The trial court's findings of fact on this question are not clearly erroneous and the encouragement and support clearly present under these facts support the imposition of liability.[16/] See Carbon Fuel Co. v. United Mine Workers, 444 U.S. 212, 216-18, 100 S.Ct. 410, 413-414, 62 L.Ed.2d 394 (1979) (law still requires proof of agency in order to impose liability for damages resulting from wildcat strikes; recovery denied absent instigation, support, ratification or encouragement of work stoppage); United Steel Workers of America v. Lorain, A Div. of Koehring Co., 616 F.2d 919, 921-23 (6th Cir. 1980), cert. denied, 451 U.S. 983, 101 S.Ct. 2313, 68 L.Ed.2d 839 (1981) (same); Southern Ohio Coal Co. v. United Mine Workers, 551 F.2d 695, 701 (6th Cir. 1977), cert. denied, 434 U.S. 876, 98 S.Ct. 227, 54 L.Ed.2d 155 (1978) (there may be circumstances where a union's studied ambivalence toward an unauthorized strike constitutes sufficient inducement, encouragement and condonation to allow damage recovery) (dictum); Riverton Coal Co. v. United Mine Workers of America, 453

F.2d 1035, 1042 (6th Cir.)., cert. denied, 407 U.S. 915, 92 S.Ct. 2439, 32 L.Ed.2d 690 (1972) (damages recoverable where union allowed wildcat strike to continue in order to bring pressure to bear on employer and reap benefits of illegal work stoppage without outwardly violating contractual commitments).[17]

IV

The court below was required to determine not only the question of Local 70's liability, but also questions of damages attributable to Local 70's conduct. Several distinct damages issues are raised on appeal. For the most part, we affirm the lower court's awards. In computing damages attributable to loss of customers, however, it does not appear that the lower court determined whether any portion of the carriers' overhead should be excluded from the lost customers award. As a consequence, remand will be necessary.

A.

Local 70 first claims that it was severely prejudiced because the employers' original complaint did not request recovery for damages caused outside Alameda County. The record, however, shows that the employers requested an amendment to conform to proof and that the amendment was submitted prior to the presentation of Local 70's case. The court took the motion under submission.

[14] During the course of the trial, the issue of liability outside Alameda County was addressed by all parties. There is no merit in Local 70's contention that it was misled by the trial court. The court merely postponed its determination of the issue without definitively ruling either way. Moreover, the court seriously questioned the existence of any prejudice at an early stage in the litigation. Case law confirms the absence of prejudicial error in this context. See Sauers v. Alaska Barge, 600 F.2d 238, 244 (9th Cir. 1980); Hecht v. Harris, Upham & Co., 430 F.2d 1202, 1211 (9th Cir. 1970); Deakyne v. Commissioners of Lewes, 416 F.2d 290, 300 (3rd Cir. 1969).

B.

Local 70 also contends that it should not have sustained contractual liability as a consequence of the work stoppages occurring outside its jurisdiction because those stoppages did not involve any striking members of Local 70 but only members of other bargaining units who respected picket lines established by Local 70 members.

Local 70's reliance on Eazor Express, Inc. v. International Brotherhood of Teamsters, 520 F.2d 951 (3rd Cir. 1975), cert. denied, 424 U.S. 935, 96 S.Ct. 1149, 47 L.Ed.2d 342 (1976), in support of its contention, however, is unjustified. In Eazor, wildcatting union members picketed an employer and precipitated a sympathy strike by members of a fellow union. Id. at 965. Although the court intimated that a noncontractual remedy might have been available to the employer had it properly raised the issue at trial, the court found no union liability. Local 70's posture is far different from that of the union in Eazor. The union in this case initiated and retained control over the picket line activity.

[15] Local 70 further argues that there is no contractual liability when workers outside of Local 70's bargaining unit either fail to work or take other economic action in response to its picket lines. The law does not support this position. See Texas Distributors, Inc. v. United

Association Journeymen & Apprentices, 598 F.2d 393, 400-01 (5th Cir. 1979) (in employer's damage action under 29 U.S.C. § 158(b)(4) against alleged secondary picketing, it was irrelevant *which unions* actually refused to work while the union picket was present); *Campbell "66" Express, Inc. v. Rundel*, 597 F.2d 125, 128 98th Cir. 1979) (evidence that trucks would not cross picket lines and that as a result employer suffered a loss of income presented a sufficient showing of possible irreparable harm to permit issuance of preliminary injunction against picketing); *Lawhon Construction Co. v. Carpet, Linoleum & Resilient Floor Decorators*, 513 F.2d 723, 724-25 (8th Cir. 1975) (damage recovered under 29 U.S.C. § 158(b)(4) when members of other trades refused to cross union picket lines and completion of project delayed); Blue Diamond Coal v. United Mineworkers of America, 436 F.2d 551, 558-59 (6th Cir. 1970), cert. denied, 402 U.S. 930, 91 S.Ct. 1525, 28 L.Ed.2d 863 (1971) (damage flowing from work stoppage caused by union pickets is attributable to the parties responsible for the picketing).

In a similar vein Local 70 contends that because its personnel were not involved in production at the manufacturing plaintiffs, Sunshine Biscuit and Granny Goose, it cannot be liable for the work stoppages that resulted when production employees respected picket lines established by Local 70 members. Local 70 directs our attention to Buffalo Forge Co. v. United Steelworkers of America, 428 U.S. 397, 96 S.Ct. 3141, 49 L.Ed.2d 1022 (1976), for the proposition that there is a legal distinction between strikes by employees in one bargaining unit and strikes by employees in another unit in sympathy for the former.

[16] Although such a distinction was drawn in Buffalo Forge, there is no merit in Local 70's reliance on the case: It simply held that a federal court could not enjoin a sympathy strike pending an arbitrator's decision on the question whether the strike was forbidden by a

no-strike provision in the collective bargaining contract to which the striking union was a party. *Buffalo Forge*, 428 U.S. at 410-13, 96 S.Ct. at 3148-50. In this case, the conduct of the pickets, not the sympathy strikers, is at issue. As such, *Buffalo Forge* is no aid to Local 70. A union may be liable when its picket activity foreseeably induces the absence of employees, even though the employees are not members of the union. *See Texas Distributors*, 598 F.2d at 400-01; *Campbell "66" Express*, 597 F.2d at 128; *Lawhon Construction Co.*, 513 F.2d at 724-25; *Blue Diamond Coal*, 436 F.2d at 558-59.

C.

Local 70 asserts that, as to

both fixed cost and lost profits, the trial court failed to account for a reduction in the carrier's anticipated revenue caused by work stoppages that were contemporaneously affecting other carriers throughout the nation, especially in Los Angeles. Certain principles previously established in this circuit regarding damage awards are relevant in reviewing this contention. Once an employer has proven that it has suffered some injury, "'[it] need not detail the exact amount suffered; it will suffice if the evidence shows the extent of damages as a matter of just and reasonable inference, although the result may be only approximate.'" Frito-Lay, Inc. v. Local Union No.

137, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, 623 F.2d. 1354, 1364 (9th Cir. 1980), (quoting Gulf Coast Building and Supply Co. v. Electrical Workers, Local 480, 428 F.2d 121, 125-26 (5th Cir.), cert. denied, 400 U.S. 942, 91 S.Ct. 240, 27 L.Ed.2d 246 (1970)). As a corollary to this rule, a court will not "review on appeal the merits of various methods of calculation, so long as the method actually employed by the district court is designed to yield a reasonable approximation of damages." Frito-Lay, 623 F.2d at 1364-65.

[17,18] Although Local 70 correctly maintains that the employers had the burden of segregating lost

fixed costs and profits from the influence of work stoppages elsewhere, see Motor Carriers Council v. Local Union No. 600, 516 F.2d 316, 317-18 (8th Cir. 1975); Abbott v. United Association of Journeymen & Apprentices, 429 F.2d 786, 790 (5th Cir. 1970), there is no indication in either the record or the briefs that the trial court excluded such considerations. The effect of the Los Angeles work stoppage on the carriers' fixed costs was expressly determined and sequestered from the fixed cost claimed by the employers. By deducting the fixed cost factors attributable to the Los Angeles carriers, the trial court apparently followed the dictates of Motor Carriers Council.

Reliance on this formula was not error.

[19] Local 70's contention that the trial court did not consider the effect of other work stoppages on lost profits is unfounded. The trial court calculated lost profit damages on a 50 percent basis of the inbound and outbound revenue allocated to the Oakland facilities, as applied to the operating ratio of the specific carriers, and on the revenue which other terminals would have received but for the work stoppage at the Bay Area facilities. Although the 50 percent formula would not seem to be an absolute reflection of the actual effect of other work stoppages on the Bay Area lost profits, other courts

have used a fifty percent formula for similar purposes.[18/] Indeed, such a formula is wholly appropriate when a damage calculation, such as that before the lower court, is not susceptible to precise formulation. See Kissell Co. v. Gressley, 591 F.2d 47, 50 (9th Cir. 1979) (in applying Arizona law, court notes that once fact of lost future profits is established, courts will not quibble over numbers involved, but will adopt a lenient approach to measurement of injury). In any event, Local 70 presents this court with no alternative method of computing either fixed cost or lost profit in light of work stoppage elsewhere or any evidence that the trial court's method was unreasonable. Such a failure has influenced at least one court's denial of appellate relief under similar circumstances. See Motor Carriers, 526 F.2d 316, 316-17 (8th Cr. 1975). Under the circumstances, we cannot find fault with the district court's formula.

D.

[20] On the basis of testimony it extracts from the trial record, Local 70 argues that the carriers were able to recoup substantial revenue lost during the strike through various embargo and deferral mechanisms. In support of this position Local 70 cites Foam and Plastics Division, Tenneco Chemicals, Inc. v. General Drivers & Helpers Local 401, 520 F.2d

945 (3rd Cir. 1975), to the effect that only revenues which have been permanentaly lost can be recovered in damages.

Although Local 70 correctly states the law, Tenneco involved a carrier's claim for lost revenue allegedly sustained during a work stoppage with a duration of only one work shift. The court denied the carrier's claim, finding that the carrier failed to meet its burden of proving "that production was lost in view of the substitution of other carriers and the brevity of the work stoppages ...." Tenneco, 520 F.2d at 951. These same factors undoubtedly contributed to Tenneco's inability to establish that its pick-up revenues were irretrievably lost. Because the stoppages at issue in this case were more extended (eight and ten days respectively), Tenneco is of no utility for purposes of factual comparison.

The employers argue that pre-strike and post-strike monthly averages presented at trial indicate that there had been no recoupment of revenue. Averaging prior monthly revenue as indicia of lost revenue has been countenanced by this court and others, Maxey v. Butcher's Union Local No. 126, 627 F.2d 912, 916 (9th Cir. 1980); Frito-Lay, 623 F.2d at 1363-65; Anderson v. International Brotherhood of Electrical Workers, 422 F.Supp. 1379, 1385 (W.D.Pa.1976); Union Tank

Car Co. v. General Truck Drivers, 309 F.Supp. 1162, 1173-74 (E.D.La.1970), and the paradigm offered by the employers would have satisfied at least one former union defendant. United Electrical Radio & machine Workers v. Oliver Corp., 205 F.2d 376, 387-89 (8th Cir. 1953) (in jury trial resolving defendant union's liability in damages for work stoppages, defendant's claim of revenue recoupment insufficient to require production of employers previous and subsequent months average revenue). We therefore affirm the district court on this issue.

E.

[21] Local 70 complains that the trial court failed to account for

the absence of actual wear and tear on the carrier's vehicles in its award of depreciation. The point has been settled in this court's decision in Frito-Lay, Inc. v. Local Union No. 137, International Brotherhood of Teamsters, 623 F.2d 1354 (9th Cir. 1980), and any argument on the matter has been foreclosed.[19/] In Frito-Lay we affirmed the district court's award of straight-line depreciation for vehicles idled by illegal union work stoppage. Frito-Lay, 623 F.2d at 1364-65. Consequently, we reject Local 70's contention that the trial court was required to allocate depreciation between a use and time basis.

F.

The district court found that

three carriers, Crescent, Delta and Sterling Transit, permanently lost customers as a result of the work stoppage. Local 70 contends that by refusing to deduct overhead (fixed costs) from projected lost gross profits, the trial court erred.

There is merit in the Local 70's assertion. In determining this element of damage, the trial court, without any qualification, outlined a previous trial court's award of overhead and its subsequent affirmation by this court in an unpublished opinion. As a result, it is unclear whether the court applied the correct standard.

In this circuit, "[d]amages may be awarded on the basis of gross profits [profits minus variable expense] when the breach does not significantly reduce overhead." Edwin K. Williams & Co. v. Edwin K. Williams, 542 F.2d 1053, 1062 (9th Cir. 1976), cert. denied, 433 U.S. 908, 97 S.Ct. 2973, 53 L.Ed.2d 1092 (1977) (citing Buono Sales, inc. v. Chrysler Motors Corp., 449 F.2d 715, 719-20 (3rd Cir. 1971)). Buono Sales is one of the leading cases supporting the proposition that when a promisee, by virtue of a promisor's breach, is freed to apply fixed costs in another profitable manner, the advantage so derived must be deducted from the gross profit along with variable costs.

The court in Edwin K. Williams allowed recovery of overhead, absent a demonstration that the "breach [did] not significantly reduce overhead," Edwin K. Williams,, 542 F.2d at 1062. In Buono Sales and Vitex Manufacturing Corp. v. Caribtex Corp., 377 F.2d 795, 799-801 (3rd Cir. 1967), the Third Circuit held that fixed costs are recoverable only if truely lost. Buono and Vitex Manufacturing would require deduction of fixed cost from gross profit in any situation in which such overhead could be defrayed, not merely when it could be reduced. Buono Sales, 449 F.2d at 719-721; Vitex Manufacturing, 377 F.2d at 799-801. In Buono, remand was necessitated on this issue because the trial court failed to consider whether fixed costs had been profitably applied to a new line of sales, thereby minimizing the effect of defendants' breach. Buono Sales, 449 F.2d at 721. Other situations could be imagined in which minimization would not be possible. See Huffman Towing, inc. v. Mainstream Shipyard & Supply, Inc., 388 F.Supp. 1362, 1371-72 (N.D.Miss.1975) (lost fixed cost fully recoverable where return of two boats delayed).

[22-24] It does not appear that the district court adhered to the principles announced in Edwin K. Williams, Buono Sales or Vitex Manufacturing. Remand will be required because it is unclear whether the court below considered the extent

to which the carriers applied their freed fixed costs, if any, to other profitable ventures.[20/]

V.

In summary, because the union's repudiation occurred in proceedings before the district court, we affirm the court's conclusion that it had jurisdiction to determine the existence of contractual repudiation. We also affirm the court's findings of repudiation and agree with its determination that the Local 70's April and May work stoppages and picketing violated the NMFA and Supplemental Agreement. Finally, although in large part we affirm the court's damage awards, the question whether the carriers defrayed portions of their overhead and deducted that amount from lost gross profit must be remanded. It does not appear that the court below determined whether the carriers applied any overhead to other profitable ventures, thereby reducing their damages.

AFFIRMED in part; REMANDED in part.

FOOTNOTES

1/ Page 5 — Article 37 of the NMFA provides that it shall remain in force from "April 1, 1967 to and including March 31, 1970, *and shall continue from year to year thereafter unless written notice of desire to cancel and terminate the agreement is served by either party upon the other at least 60 days prior to the date of expiration.*" (Emphasis added)

2/ Page 6 — Section 2 provides:

Where no such cancellation or termination notice is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions of this Agreement, either party may serve upon the other a notice of least sixty (60) days prior to March 31, 1970 ... advising that such party desires to revise or change terms or conditions of such Agreement.

3/ Page 7 — Thus, the national monetary settlement involving hourly rates, mileage rates, cost of living, health and welfare, pensions, holidays and vacation became effective on April 1, 1970, while nonmonetary revisions, such as those involving the grievance machinery, became effective on May 18, 1970.

4/ Page 10 NLRB v. Brotherhood of Teamsters & Auto Truck Drivers, 470 F.2d 509 (9th Cir. 1972), cert. denied, 414 U.S. 821, 94 S.Ct. 117, 38 L.Ed.2d 54 (1973).

5/ Page 16 Local 70 also asserts that the retroactivity of the 1970-1973 agreement was a procedural question to be determined only by the arbitrator. Local 70 bases its contention on section 8(f) of the 1970-1973 agreement, which provides:

> All local, area and national grievance committees as constituted under this agreement shall have the jurisdiction and power to decide grievances which arose under the preceding agreements and supplements thereto, applying, however, the contract under which the grievance arose.

Local 70's claim is untenable. Unless parties have explicitly agreed to the contrary, it is a matter for the courts, not the arbitrator, to decide whether the parties have agreed to submit specific issues to arbitration. John Wiley & Sons, 376 U.S. at 546-47, 84 S.Ct. at

912; *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 861 (9th Cir.), *cert. denied*, 444 U.S. 827, 100 S.Ct. 51, 62 L.Ed.2d 34 (1979). Although this court has countenanced submission of the issue of arbitrability itself to the arbitrators when the contract specifically so provides, *see Amalgamated Clothing & Textile Workers Union v. Ratner Corp.*, 602 F.2d 1363, 1366, 1370 (9th Cir. 1979) ("[a]ny and all matters in dispute, including a dispute concerning the interpretation or application of the arbitratioon provision") there is no specific clause in this case limiting the district court's power to determine the retroactivity of the 1970-1973 agreement. Consequently, the district court properly addressed the question of retroactivity free from the restraining influence of any provision expressly denying it jurisdiction. *See Nold Bros., Inc. v. Bakery & Confectionery Workers Union*, 430 U.S. 243, 250, 97 S.Ct. 1067, 1071, 51 L.Ed.2d 300 (1977) (court has jurisdiction to determine if grievance "arose" under expired contract); *Kaufman & Broad House Systems, Inc. v. International Brotherhood of Firemen & Oilers*, 607 F.2d 1104, 1109-12 (5th Cir. 1979) (extension and notice provisions of agreement construed by court); Newspaper Guild of Greater Philadelphia v. Central States Publishing Co., 451 F.Supp. 1112, 1114-1115 (E.D.Pa.1978) (where 1973-75 contract expired, court, not arbitrator had duty to determine whether parties agreed to "abide by the terms of the old contract on a day-to-day basis"); Milwaukee Typographical Union v. Madison Newspapers, Inc., 444 F.Supp. 1223, 1226 (W.D.Wis.1978), aff'd 622 F.2d 590 (7th Cir. 1980) (court has jurisdiction to determine whether contract expired, whether grievance "arose" under the contract, and whether the obligation to arbitrate survived the agreement).

The court below found that the 1967-1970 agreement, although facially set for expiration on March 31, 1970, continued in force until May 18, 1970 and that only the monetary provisions of the 1970-1973 agreement would have retroactive effect to April 1, 1970. Without debating the propriety of the court's conclusion, Local 70 asserts that the lower court's determination was based exclusively upon parole evidence--a letter from Teamster Vice-President Frank Fitzsimmons stating that the nonmonetary clauses of the 1970-73 agreement would be effective May 18, 1970. We need not determine whether the evidence submitted at trial on this issue was parole evidence because this court has previously found that parole evidence and evidence of bargaining history are relevant and admissible on the issue of arbitrability. See Communications Workers of America v. Pacific Northwest Bell Telephone Co., 310 F.2d 244, 247 (9th Cir. 1962); Association of Industrial Scientists v. Shell Development Co., 348 F.2d 385, 388 n.4 (9th Cir. 1965).

6/ Page 18 See Note 10, infra.

7/ Page 25 See United Steelworkers of America v. Mesker Brothers Industries, Inc. 457 F.2d 91, 95 (8th Cir. 1972) (federal court cannot refuse to exercise jurisdiction where the parties have waived right to arbitrate); Alloy Cast Steel Co. v. United Steelworkers of America, 429 F.Supp. 445, 450 (N.D. Ohio 1977) (by failing to assert their contract right prior to trial union waived any right it possessed to require resolution of dispute through arbitration); Necchi Sewing Machine Sales Corp. v. Carl, 260 F.Supp. 665, 667-68 (S.D.N.Y. 1966) (court must decide questions of laches and waiver arising out of conduct before it); *Brothers Jurevicz, Inc. v. Atari, Inc.*, Minn., 296 N.W.2d 422, 427-28 (1980) (when arbitration request is made after litigation has commenced and party opposed to arbitration claims laches or waiver predicated solely upon participation in lawsuit by parties seeking arbitration, limited exception to general rule that issue of whether right to request arbitration is lost due to laches and waiver should be decided by arbitrator exists giving trial court jurisdicition to decide the issue); *Butchers Union Local 532 v. Farmers Market*, 67 Cal.App.3d 905, 928-29, 136 Cal.Rptr. 894, 899-900 (1977) (defendant wishing to assert right to arbitration must urge it as an affirmative defense in its answer and court has power to determine whether failure to do so amounts to a waiver).

8/ Page 29 Local 70 argued that the *employers* actually considered their actions to be based upon violations of the 1970-1973 agreements and that therefore the court had to *dismiss* the action because those contracts required the submission of damage claims to arbitration and that if there was an issue as to which collective bargaining agreement was in effect during the strike, it was for the arbitrator to determine that issue. It also contended that if the 1967-1970 agreements did apply, the employers' damage claims were "factual" disputes which did not involve an interpretation of the master agreement and, therefore, had to be submitted to the local grievance procedures contained within the supplemental agreement. Moreover, Local 70 vigorously asserted that the court was required to dismiss the complaint because it was not tenable for a district court to stay proceedings. Finally, it contended that, in any event, work stoppages, sick-outs and picketing were not strikes and, therefore, any claims for damages resulting from such actions also had to be submitted to the grievance procedures.

9/ Page 29 Local 70's motion for stay was narrowly limited to a request for a stay pending submission of a single issue to the grievance procedure--which collective bargaining agreements were applicable to the dispute:

> If the National Grievance Committee determines that the claims are governed by the 1970-1973 agreement through and including April 1, 1970, then this Court can proceed based upon a suit which

> alleges a breach of that collective bargaining agreement. If the National Grievance Committee determines that it has no jurisdiction over claims except those occurring on or after May 18, 1970, then this Court can safely proceed with a suit based upon the 1967-1970 National Master Freight Agreement. In the alternative, if the National Grievance Committee deadlocks over these issues then under either the 1967-1970 or the 1970-1973 agreement, this Court can safely proceed, with the intention of the parties contained in both agreements having been clearly effectuated (emphasis added).

10/ Page 32 In the usual case, the presumption of arbitrability would require the district court to defer to the arbitrator for an interpretation of the words "strike" and "in violation of this agreement". See Howard Electric, 423 F.2d at 165-66; Los Angeles Paper Bag, 345 F.2d at 759; see generally Johnston-Tombigbee Furniture, 596 F.2d at 128; Carpenter's District Council v. Brady Corp., 513 F.2d 1, 3-4 (10th Cir. 1975); Marble Products Co. of Georgia v. United Stone & Allied Products Workers, 335 F.2d 468, 471-72 (5th Cir. 1964); Stokely-Van Camp, 480 F.Supp. at 49; Commonwealth Oil Refining Co. v. Union Independiente de la Industria de Petroquimicas de Puerto Rico, 443 F.Supp 586, 588 (D. Puerto Rico 1977); Charmers Industries, Inc. v. Liquor Salesmen's Union, 415 F.Supp. 781, 785 (S.D.N.Y.1976). Because Local 70 is estopped from relying on the arbitration provision of the collective bargaining agreement, we do not reach this issue. For the same reason, we need not respond to the employers' contention that Local 70 failed to raise several of its current arguments in trial court.

11/ Page 35 The district court found that Local 70's strike motivation centered on a desire to break the employer away from its multi-employer bargaining unit.

12/ Page 39 Local 70 relies on NLRB v. J. H. Bonck Co., 424 F.2d 634, 637-38 (5th Cir. 1970), as adequately depicting the "repeated" recognition of the distinction between "impasse" and "failure to agree". Bonck, however, merely held that the NLRB's factual determination of impasse was entitled to exceptional deference, Bonck, 424 F.2d at 638, and does not enhance Local 70's argument.

13/ Page 40 See Clark v. Mt. Gilead Baptist Church, 156 N.Y.S. 305 (Sup.1915) (where a building contract provided that, in case the owners and contractors failed to agree on matters of payment, the matter should be referred to a board of arbitration, mere failure to make payment on demand is not a "failure to agree on matters of payment"); In re Moore, 79 Ind.App. 470, 475-476, 138 N.E. 783, 784 (1923) (workmen's compensation act providing that, if parties fail to agree regarding payment of compensation, or if, having made an agreement, they disagree as to continuance of payment, then either party may apply to an industrial board for a determination of the controversy, is in harmony with the rule that the law favors settlements, and implies that there shall be at least a good faith effort to settle the dispute and an actual disagreement as to the rights of the parties, before the industrial board is authorized to hear and decide the matter in dispute, the word "failure" connoting an attempt, an effort).

14/ Page 40 Although the word "disagree" more closely approximates the meaning advanced by the union, our discussion of the term is offered for purposes of comparison only and should not be read as a suggestion that a different result necessarily would have been reached had the word "disagree" been present.

15/ Page 43 The district court also found that some of the May stoppage activity began *prior* to the arrival of the Los Angeles pickets.

16/ Page 43 The trial court's finding that certain picketing was secondary also supports the damages award because Article 9 of the NMFA expressly precluded such activity.

17/ Page 45 The trial court found that Local 70 was liable because it did not make a "good faith effort to return those employees to work once it was determined that the picketing activity of Local 208 dissidents was an unlawful wildcat action not protected by ... the agreement ...." This statement proves too much. Local 70 would be liable for failure to institute all reasonable means to abate stoppages *only where the agreement specifically provided such a responsibility or where it had actively encouraged the stoppage*. *Carbon Fuel Co.*, 444 U.S. at 216-18, 100 S.Ct. at 418-414. Nothing in the NMFA or Supplemental Agreement imposed a duty to exercise all reasonable means to abate the stoppage. See Lorain, 616 F.2d at 922 (phrase "actively discourage and endeavor to terminate" did not impose obligation to use all reasonable efforts to terminate stoppage where it did not specifically modify union liability clause). Consequently, the liability for the May stoppage can only be predicated upon the trial court's finding of encouragement and support.

18/ Page 57 Cf. Nolan Brothers, Inc. v. United States, 437 F.2d 1371, 1386-87 (Ct.Cl.1971) (standby expense occasioned by breach of contract determined at one-half rental value of equipment); Laburnum Construction Corp. v. United States, 325 F.2d 451, 459 (Ct.Cl.1963) (one-half rental value recoverable where equipment idled due to defendant's breach).

19/ Page 63 See Sears Oil Co. v. Commissioner, 359 F.2d 191, 198 (2nd Cir. 1966) (for depreciation purposes useful life of barge initiated when it became ready for service, not when put into use); P. Dougherty Co. v. Commissioner, 88 F.2d 632, 634 (2nd Cir. 1936) (idle factory may depreciate more rapidly than one in use). But see

Airco-Speer Carbon-Graphite v. International Union of Electrical, 479 F.Supp. 246, 257-58 (W.D.Pa.1979) (denying employer's demand for depreciation while noting that employer had failed to distinguish idled and used time and indicating that it was doubtful such damages could have been within the contemplation of the parties).

20/ Page 67 Local 70 raises two other issues. First, it argues that, by turning down an offer of 50 percent of Sunshine Biscuit's business, Crescent Lines failed to minimize its damages. The trial court made findings on this matter and the record supports its conclusion that it was economically difficult for Crescent to handle the Sunshine Biscuit account on such a greatly reduced scale. We find no error in the district court's conclusion that Local 70 did not establish the manufacturing plaintiffs' failure to mitigate damages. See, e. g., Eazor Express, 520 F.2d at 971-79; Roadway Express, Inc. v. Highway Truck Drivers & Helpers, 299 F.Supp. 1058, 1062-63 (E.D.Pa.1969); Airco Speer Carbon-Graphite, 479 F.Supp. at 258 (W.D.Pa.1979). Delaware Coca-Cola Bottling Co. v. General Teamsters Local Union 326, 474 F.Supp. 777, 787 (D.Del.1979), rev'd on other grounds, 624 F.2d 1182 (3rd Cir. 1980).

Second, Local 70 argues that the temporary loss of California Motor Express' [CME] Pepsi Cola account was proven by mere hearsay. CME's representative testified to the following:

> It was Les Vierra that told me that New York Traffic Department had told them to favor the truck lines that were servicing them during this period of strike activity.

We need not resolve this hearsay question because CME's representative also testified that he had been informed by a Pepsi Cola representative that he had no orders for CME. The out-of-court statement of the Pepsi-Cola representative was not offered for the truth of the matter asserted; rather, the statement had an operative effect in the nature of a contract rejection wholly apart from the truth of the assertion. See Gibbs v. State Farm Mutual Insurance Co., 544 F.2d 423, 428 (9th Cir. 1976) (in action against insurer to recover on theory of bad-faith failure to settle, letter from insured to insurer's attorney informing him that father of child injured in accident would be happy with settlement within policy limits was properly admitted to show that insurer had received this information and did not constitute hearsay because not admitted for its truth); *Great Lakes Gas Transmission Co. v. Grayco Constructors, Inc.*, 506 F.2d 498, 503-04 (6th Cir. 1974), *cert. denied*, 420 U.S. 947, 95 S.Ct. 1330, 43 L.Ed.2d 426 (1975) (in action by gas transmission company to recover damages from contractor which constructed portion of pipeline which ruptured, letter from Director of Transportation directing plaintiffs to reduce operating pressure because of ruptures properly admitted not as proof of ruptures but to substantiate plaintiff's claim of loss of revenues stemming from pressure reduction); Wigmore, *Evidence* § 1770 at 190 (ed ed. 1940) ("[t]he fact of *sending a notice* is often essential as a part of the issue, for example, a notice to an indorser, a notice of recission, a notice of rejection of defective goods, a notice of injury by municipal negligence ... in such cases the terms of the notice are receivable under the present principle, without regard to the truth of any assertion that may be contained in it"); *see generally*, Fed.R.Evid. 801(c) (1976). Alternatively, introduction of the Pepsi-Cola representative's statement could be sustained on a verbal act rationale. *See NLRB v. H. Koch & Sons*, 578 F.2d 1287, 1290-91 (9th Cir. 1978) (whether agreement to pay severance pay was entered into by parties; testimony as to what witness said was evidence of verbal conduct pursuant to rule 801(c)); *cf. Avery v. Commissioner*, 574 F.2d 467, 468 (9th Cir. 1978) (admission of hearsay testimony of IRS agent, who in making original deficiency determination relied heavily on information from deceased, to support reasonableness of agents actions was consistent with testimony's limited admission on motion to shift burden of proof and such testimony was not used as substantive support for Commissioner of Internal Revenue's action in estimating that taxpayer had sold a total of $60,000 worth of heroin in a three-month period).

The trial court also received testimony establishing that CME's thirteen year account with Pepsi-Cola was interrupted precisely when the April work stoppages commenced. Evidence also established that the account was not revived until late June. The trial judge therefore could permissably infer from the cessation of the account and the CTE representative's testimony concerning the Pepsi-Cola's representative's operative rejection that the damage was attributable to Local 70. It was not necessary for the lower court to rely upon the Pepsi-Cola representative's contention that his company was "taken care of" or the Pepsi-Cola representative's out-of-court narration of what the New York Traffic Department told him.

Moreover, our review of the record indicates that Local 70 did not register an objection to the CTE representative's testimony at trial. On the contrary, the record indicates that counsel for Local 70 elicited from the CTE representative the same testimony it now characterizes as hearsay. Local 70 cannot now be heard to complain of the testimony's introduction. See Vannoy v. Chicago, Burlington & Quincy Railroad Co., 462 F.2d 186, 187 n.2 (9th Cir. 1972); Hayden v. Chalfant Press, Inc., 281 F.2d 543, 548 (9th Cir. 1960).

APPENDIX B

FILED
JUNE 3, 1980

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

CALIFORNIA TRUCKING)
ASSOCIATION,)
Plaintiff-Appellee,)
v.)No. 77-3445
BROTHERHOOD OF TEAMSTERS)
& AUTO TRUCK DRIVERS,)D.C. Nos.
LOCAL 70,)C-70-883-AJZ
Defendent-Appellant.)C-70-1057-AJZ
)
GRANNY GOOSE FOODS, INC.)
et al.,)
Plaintiff-Appellee,)
v.)
BROTHERHOOD OF TEAMSTERS)
& AUTO TRUCK DRIVERS,)
LOCAL 70,)
Defendant-Appellant.)
)

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing in banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Robert A. Grant, Senior United States District Judge for the Northern District of Indiana, sitting by designation.

APPENDIX C

FILED
FEB 25, 1977

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

CALIFORNIA TRUCKING)
ASSOCIATION,)
Plaintiff-Appellee,)
v.)
BROTHERHOOD OF TEAMSTERS)
& AUTO TRUCK DRIVERS,)
LOCAL 70,)C-70-883-AJZ
Defendent-Appellant.)C-70-1057-AJZ

GRANNY GOOSE FOODS, INC.)
et al.,)
Plaintiff-Appellee,)
v.)
BROTHERHOOD OF TEAMSTERS)
& AUTO TRUCK DRIVERS,)
LOCAL 70,)
Defendant-Appellant.)

MEMORANDUM OPINION AND ORDER

LIABILITY

This is an action arising under section 301 of the Labor Management Relations Act (29 U.S.C. $ 185) to recover damages proximately caused by a violation of a collective bargaining agreement between employers and a labor organization representing employees in an industry affecting commerce. This court has jurisdiction of the parties by virtue of the fact that defendant Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70, (hereinafter "Union" or "Local 70") maintains its principal offices in Alameda County, California, within the geographical jurisdiction of this court.

THE COLLECTIVE BARGAINING AGREEMENTS

On April 1, 1967, plaintiffs and defendant Local 70 became parties to written collective bargaining agreements entitled "National Master Freight Agreement" (hereinafter "Master Agreement") and "Local 70 Pickup and Delivery Supplemental Agreement"[1/] (hereinafter "Supplemental Agreement"). Although these contracts are ostensibly for the period April 1, 1967, to March 31, 1970, Article 61 of the Supplemental Agreement provides that the term of that agreement is "subject to and controlled by all the provisions of Article 37 of the National Master Agreement ...." Article 37 of the Master Agreement provides that its term shall be from "April 1, 1967, to and including March 31, 1970, and shall continue from year to year thereafter unless written notice of desire to cancel and terminate the agreement is served by either party upon the other at least 60 days prior to the date of expiration." (Emphasis added.)

The evidence of record clearly establishes that the 1967-1970 contracts remained in effect during the period April 1, 1970, to May 18, 1970. This extension of the contracts beyond March 31, 1970, was triggered by the fact that neither party gave notice of its desire to terminate or cancel the agreement, which was necessary to prevent the contract from remaining in full force and effect beyond March 31, 1970. The parties did, however, take action that would allow for amendment of the agreements.

Section 2 of Article 37 of the Master Agreement enabled the parties to amend the contract by providing:

> Where no such cancellation or termination notice is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions of this Agreement, either party may serve upon the other a notice at least sixty (60) days prior to March 31, 1970, ... advising that such party desires to revise or change terms or conditions of such Agreement.

Defendant's negotiation representative provided timely notice to amend. As a result, the parties commenced negotiations for the revisions in early 1970. These negotiations continued without impasse until a "tentative agreement" was reached on April 2, 1970. The agreement was tentative in that it could not become operative until it was ratified by the full membership of the International Brotherhood of Teamsters. The parties agreed that the monetary items contained in the agreement would be retroactive to April 1, 1970, and that the non-monetary language would be prospective from the date of ratification. Since the contract was not ratified until May 18, 1970, the non-monetary provisions of the agreement did not become effective or operative until that date. Thus, the national monetary settlement involving hourly rates, mileage rates, cost of living, health and welfare, pensions, holidays, and vacation became effective on April 1, 1970, while non-monetary revisions, such as those involving the grievance machinery, became effective on May 18, 1970. This interpretation of the settlement is buttressed by the language used by Frank Fitzsimmons,[2/] in his letter to the chairman of the employer's negotiating committee.[3/] In addition, every tribunal, including this court, which has had occasion to review the facts surrounding the revision of the 1967-1970 contracts, has determined that the 1967-1970 agreements remained in full force and effect until May 18, 1970.[4/]

In its order dated January 25, 1974, this court decided that the 1967-1970 collective bargaining agreements were in effect during the period in question. On page 7 of its order the court stated:

> No written notice to cancel or terminate was given by defendants or the International Brotherhood of Teamsters. Thus the agreement did not automatically expire on March 31, 1970, but continued in effect, since the 1970-1973 amendments were not ratified by the union membership until May 18, 1970, and all new negotiations were not completed until August 10, 1970. See Board's Decision and Order reported at 194 N.L.R.B. No. 106. Therefore, the 1967-1970 agreements, not the 1970-1973 agreements, govern the period of defendants' alleged strike activity. Furthermore, defendants steadfastly refused to sign, recognize, or be bound by the new agreements until November 21, 1973, after their application for writ of certiorari was denied by the Supreme Court and

> the ninth circuit enforcement order became final.

On May 8, 1975, this court also held that the following fact existed without substantial controversy and was, therefore, deemed to be established for all purposes in the action:

> The term of the 1967-1970 National Master Freight Agreement and 1967-1970 Local 70 Pickup and Delivery Supplemental Agreement was extended to May 18, 1970.

Clearly, then, the 1967-1970 collective bargaining agreements were in full force and effect during the period of April 1, 1967, to May 18, 1970.

Notwithstanding that no impasse had been reached in the negotiations for the amendments to the agreements, Local 70 commenced strike and picket activity against the trucking plaintiffs on or about April 1, 1970. Although most of the picketing ceased on April 4, 1970, as a result of a temporary restraining order issued by the Superior Court in and for the County of Alameda, State of California, the work stoppage continued unabated through April 7, 1970. Local 70 recommenced its work stoppage against the trucking plaintiffs on May 8, 1970, and against the snack food industry plaintiffs, Granny Goose Foods, Inc. and Sunshine Biscuit, Inc. on May 4, 1970, with the strike activity continuing through the latter part of May.

The economic activity taken by defendant against plaintiffs resulted in a complete cessation of virtually all revenue-producing operations during the period of the work stoppage. This Union activity, which was in direct violation of no-strike clauses contained within the collective bargaining agreements then in effect, gave rise to this action to recover damages proximately resulting from defendant's wrongful activity.

PLAINTIFFS NOT OBLIGATED TO SUBMIT THEIR CLAIMS THROUGH GRIEVANCE PROCEDURE

One of the threshold questions presented and ruled upon by the court adversely to the defendant was its claim that this court should stay these proceedings pending exhaustion of the grievance procedures encompassed in Article 42 of the Joint Council No. 7 Pickup and Delivery Supplemental Agreement.[5/]

Notwithstanding that the court has previously denied defendant's numerous motions to stay the proceedings pending exhaustion of the grievance procedures, notwithstanding that the parties have completed a lengthy and expensive trial on the merits, and notwithstanding that no new motion to stay the proceedings has been lodged, defendant renews its argument that the proceedings should be stayed. These arguments have no more merit now than they had when first presented.

This court, on January 25, 1974, ruled on defendant's motion to stay proceedings in the following manner:

> These same grievance procedures are relied upon by defendants who argue that plaintiff's dispute, involving as it does matters of contract interpretation, should first be submitted to the grievance committee before any judicial action is possible. Given the lack of an unequivocal no-strike provision, this position would ordinarily have considerable merit. However, in Article 8(d) the Master Agreement also contains the provision:
>
> > Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.
>
> This provision is equally applicable to the Supplemental Agreement through Section 2 of Article 2 of the Master Agreement which provides, "All such Supplemental Agreements are subject to and controlled by the terms of this Master Agreement ...."

Accordingly, plaintiff argues that Section 8(d) permits it to institute a court action based on defendants' alleged breach of the agreements without initial resort to the grievance procedures. Defendants cite Mason Dixon Lines, Inc. v. Teamsters Local 560, 443, F.2d 807 (3d Cir. 1971), in support of their position that Section 8(d) has no effect on the employer's duty to arbitrate. In Mason Dixon Lines, which considered the same Master Agreement, the New Jersey-New York Area Supplemental Agreement contained the express provision that:

> Where a strike is in violation of this Agreement, or any law including but not limited to violations of Sections 301 or 303 of the National Labor Relations Act, all issues of liability shall be resolved pursuant to the grievance procedure.

In contrast, the Supplemental Agreement here has no explicit provision limiting or abrogating Section 8(d), and thus there is no contractual bar to plaintiff proceeding in this action without pursuing whatever remedies it may have in the grievance procedure.

Since the employer association's right to bring a legal damage action without resorting to the grievance procedures is explicitly stated in the agreements, it overcomes the usual presumption in favor of arbitration. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). See also Drake Bakeries, Inc. v. Bakery Workers, 370 U.S. 254 (1962); Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

A virtually identical contractual provision was considered in Stillpass Transit Co. v. Ohio Conference of Teamsters, 382 F.2d 940 (6th Cir. 1967), cert. denied, 390 U.S. 1015 (1968), where suit was brought for breach of a no-strike clause contained within the grievance procedures of a collective bargaining agreement. The court of appeals held that the language in the agreement was not susceptible to a construction requiring the employer to

> arbitrate the claim for damages against the union, and on that basis denied the union's motion to stay or dismiss the proceedings pending arbitration. There is no relevant distinction between Stillpass and the instant action, and accordingly, defendants' motion for summary judgment must be denied. Plaintiff is under no duty to arbitrate its claims before proceeding further in this court.

This decision, which was proper when rendered, is even more so today, since both parties and the court have invested heavily in the lengthy trial of this action.

Defendant's latest theory regarding the issuance of a stay pending exhaustion of the grievance procedure is so inconsistent and mutually contradictory as to be contrary to reason. Defendant first argues that Article 8(d) of the Master

Agreement, which enables the employer to seek legal redress in the event of a strike that is in violation of the contract, "by its terms is applicable only to violations of the National Master Freight Agreement and does not govern violations of the Supplemental Agreements." Defendant then argues that because Article 8(a) of the Master Agreement[6/] requires that all factual questions involving interpretation of the Master Agreement be first submitted to the grievance procedures contained in the Supplemental Agreement, a damage action involving a factual question of interpretation must necessarily be submitted to the grievance procedure contained in the Supplemental

Agreement and that Article 8(d) does not apply to a dispute existing under the Supplemental Agreement. In order to adopt this theory, the court must, of course, first find that the grievance procedures of the Master Agreement are independent of the grievance procedures of the Supplemental Agreement, so as to isolate the supplemental procedures from Article 8(d). Having done this, the court must reverse itself and find that the grievance procedures of the two agreements are so interrelated that there is in effect only one grievance procedure and that a damage action for breach of the Master Agreement must work its way through the entire procedure. Common sense, as well as the contract, prohibits such a contradictory approach.

Article 8(d) of the Master Agreement applies equally to both the Master and the Supplemental Agreements. The Master Agreement and the Supplemental Agreement constitute a single collective bargaining agreement governing the terms and conditions of employment. One cannot be read without reference to the other. Thus, Article 2 of the Master Agreement provides:

> Section 1. The execution of this Master Agreement on the part of the Employer shall cover all operations of the Employer which are covered by this Agreement, and shall have application to the work performed within the classifications defined and set forth in the Agreements supplemental hereto.

> Section 2. There are several segments of the Trucking Industry covered by this Agreement and for this reason Supplemental Agreements are provided for each of the specific types of work performed by the various classifications of employees controlled by this Master Agreement.
>
> All such Supplemental Agreements are subject to and controlled by the terms of this Master Agreement and are sometimes referred to herein as "Supplemental Agreements."
>
> ....

(Emphasis added.) The preamble to the Joint Council No. 7 Pickup and Delivery Supplemental Agreement acknowledges the subordinate relationship of the Supplemental Agreement by providing:

> This agreement is supplemental to and becomes a part of the

> National Master Freight Agreement ....

Thus, the grievance procedures contained in the Supplemental Agreement are subordinate to the Master Agreement. The supplemental procedures constitute the first step of the single integrated procedure encompassing the provisions of both the Master and Supplemental Agreements. Since Article 8(d) is an integral part of the procedure, it cannot be divorced from the Supplemental Agreement.

Defendant's theory that the use of the words "this Agreement" in Article 8(d) was meant by the parties to limit the effect of 8(d) of the Master Agreement, and defendant's reliance upon Mason Dixon Lines, Inc. v. Teamsters Local 560, 443 F.2d 807

(3d Cir. 1971), as support for that theory have no basis in fact or in law. The parties to the contract have explicitly provided that when the term "agreement" is used by itself, without the modifying words "master" or "supplemental," the reference is to both the Master Agreement and the Supplemental Agreement. Thus in Article 1, Section 3 of the Master Agreement, the parties have provided:

> This Agreement and the Supplemental Agreements hereto, hereinafter referred to collectively as "Agreement," shall be binding upon the parties hereto, their successors, administrators, executors and assigns ....

(Emphasis added.)

A reading of the Master Agreement establishes clearly that the parties followed this method of referral throughout the contract by referring to the National Master Freight Agreement as "this Master Agreement," to the Supplemental Agreements as "Supplemental Agreements," and to the entire contract consisting of both agreements as "this Agreement." It follows that when the parties used the term "this Agreement" in Article 8(d), they were clearly referring to both the Master Agreement and the Supplemental Agreements thereto.[7/]

Furthermore, even if the collective bargaining agreements required submission of damage actions to the grievance procedures, plaintiffs were released from such contractual obligations by defendant's conduct in repudiating the contract. The defendant in this case consistently repudiated the entire collective bargaining agreement by denying throughout its existence that it was bound by that agreement. Defendant should not now be allowed to rely on the very contract which it so tenaciously repudiated for so long a period of time in defense of the employers' cause of action that arises from that very repudiation.[8]

DEFENDANT'S CONDUCT CONSTITUTED A BREACH OF THE COLLECTIVE BARGAINING AGREEMENTS

In its order of January 25, 1974, this court held that liability will have been established if the court finds a breach of an existing collective bargaining agreement between the parties. In order to find such a breach under the circumstances of this case, the court then stated that it

> must find in turn: (1) that the agreement contained a no-strike clause; (2) that negotiations to modify the agreement had not reached an impasse; and (3) that Local 70 engaged in picketing and other strike activities during the period in question.

When the evidence of record is considered in conjunction with these prerequisites for liability, it becomes clear that "the term of the 1967-1970 National Master Freight Agreement and the 1967-1970 Local 70 Pickup and Delivery Supplemental Agreement was extended to May 18, 1970," [9/] and that plaintiffs have established that during the months of April and May, 1970, Local 70 engaged in activity which constituted a violation of the collective bargaining agreement to which it and all the plaintiffs were parties.

A review of these agreements establishes that they contain provisions which prohibited defendant Local 70 from engaging in strike and picket activity. Article 8 of the National Master Freight Agreement and Article 42 of the Supplemental Agreement establish compulsory grievance and arbitration procedures to be used by the parties in settling: (1) all grievances or questions of interpretation arising under the contracts, and (2) all grievances or controversies affecting the mutual relations of the parties. By agreeing to be bound by Articles 8 and 42 of the two agreements, defendant had agreed not to utilize strikes in order to enforce its demands upon an employer who is a party to the agreements without first exhausting the grievance procedures.

That a contract does not contain an express no-strike clause does not lessen a union's duty to refrain from engaging in strike activity. The United States Supreme Court held that compulsory arbitration clauses give rise to an implied no-strike clause which is breached by the use of strike activity to enforce demands over a dispute which the agreement provides shall be settled exclusively and finally by grievance and arbitration procedures. Teamsters Local v. Lucas Flour Co., 369 U.S. 95 (1962).[10/]

In the case at hand, there can be no question but that defendant's dispute, which precipitated its strike activity, was subject to settlement by the arbitration and grievance procedures. Articles 8 and 42 of the agreements are extremely broad, covering all grievances or questions of interpretation arising under the agreements and covering all greivances or controversies affecting the mutual relations of the parties. Defendant took the position that the contracts had terminated on March 31, 1970, that it was not bound by the multi-union bargaining unit and that plaintiffs had to break away from the multi-employer bargaining unit and bargain over amendments to the agreements with defendant individually. When the companies involved in this lawsuit refused to accept this position, defendant was obligated to submit the controversy to the grievance procedure for resolution prior to taking economic action to bolster its demands. This obligation becomes patently clear in light of the Supreme Court's long-standing mandate that grievances or controversies are presumed to be arbitrable unless it can be said with reasonable certainty that the grievance language is susceptible of an interpretation excluding such a dispute. United Steel Workers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). The all-encompassing language of Articles 8 and 42 is not susceptible of such an interpretation, since the controversy raised by defendant's position not only involved a question concerning the interpretation of the agreements, but also clearly affected the mutual relations of the parties. Thus, defendant's act of engaging in strike activity to force its position upon the employers, without first exhausting the grievance procedures, amounted to a breach of the no-strike clause of the contracts under the rationale of Teamsters Local v. Lucas Flour Co., supra.

In conjunction with its grievance-related duty not to strike during the term of the collective bargaining agreements, defendant was also prohibited from engaging in economic activity by virtue of Article 37 of the Master Agreement. This article provides that regarding revisions to the contract the "respective parties shall be permitted all legal or economic recourse to support their requests for revisions if the parties fail to agree thereon." This provision clearly precludes any economic activity on the part of the party to support its demands for revisions in a contract except under circumstances where parties have failed to agree on those revisions. Only in the event of such a failure to agree are the no-strike obligations obviated. As the Eighth Circuit Court of Appeals discussed in Motor Carriers Council of St. Louis, Inc. v. Local Union No. 600, 486 F.2d 650 (8th Cir. 1973), failure to agree means that an impasse must have been reached in the negotiations. Thus, the phrasing of Article 37 requires an impasse in negotiations as a condition precedent to the right to take economic action in violation of the no-strike clauses contained in the compulsory arbitration provision.

The uncontroverted evidence of record establishes that both the leadership and the membership of defendant were wholly dissatisfied with both the status of the negotiations being conducted by their bargaining representatives for amendments to the agreements and the tentative agreement reached on April 2, 1970. Accordingly, defendant undertook economic action to force plaintiffs to accept Local 70's demands for benefits greater than those agreed to by the negotiating teams. Local 70 undertook this action notwithstanding that no impasse had been reached in the negotiations.[11/] Thus, the use of economic action on the part of defendant to support its demands for revisions of the collective bargaining agreements constituted a clear breach of those agreements. At the very least, the failure of defendant to submit to the grievance procedure the questions whether or not the contracts had expired or whether there was an impasse prior to taking economic action constituted a violation of the no-strike clauses.

The Strike Activity

The evidence of record reveals that plaintiffs have sustained their burden of proving that Local 70 engaged in conduct that constitutes a breach of the no-strike provisions of the collective bargaining agreements.

In its order of May 8, 1975, this court specified as an established fact that "during the period April 1, 1970, through May 17, 1970, defendant engaged in strike and picket activity against members of plaintiff

California Trucking Association operating within the geographical jurisdiction of defendant and employing defendant's members ...." The court, however, added the proviso that the finding did not prejudice defendent, upon showing proper cause, from introducing additional evidence at trial to rebut this fact. Given this opportunity, defandant failed to introduce credible evidence controverting the finding. The evidence that was presented by defendant served only to establish, if not strengthen, the validity of the finding. Thus, when all the evidence is considered, it becomes certain plaintiffs have proved that defendant, Local 70, engaged in a work stoppage during the periods April 1 through April 7, 1970, and May 8 through May 17, 1970.

These two periods of strike and work stoppage activity will be considered separately.

The April 1 through April 7, 1970, Activity

While apparently admitting that Local 70 engaged in strike activities against the trucking plaintiffs during the period April 1 through April 3, 1970, and against the food houses on May 14 and 15, 1970, defendant contends that it cannot be held accountable for the activity that occurred April 1 and 2 because there was no "agreement between the parties on April 1 and April 2, 1970." As hereinabove demonstrated, this argument is without merit. In addition, although acknowledging that a "sick out" may have occurred on April 6 and 7, 1970, defendant argues that the Union cannot be held responsible for such activity. This contention, too, is without merit.

Numerous witnesses were presented by plaintiffs to testify as to Local 70's conduct. The evidence adduced from this testimony is as follows: During the period April 1 through 3, 1970, agents of defendant appeared on the premises of plaintiffs and instructed the membership of Local 70 to leave their work. These same representatives of defendant then established picket lines of Local 70 members carrying signs "Teamsters Local 70 on Strike" at the entrances to the various terminals of plaintiffs. These picket lines were maintained without abatement for the first three days of April, during which time no Local 70 employees reported for their normally scheduled work. Although most of the pickets were removed on April 4, no Local 70 employees reported to work until April 8 with virtually all employees calling in sick on April 6 and 7. From the totality of the evidence as it relates to the sick out action of the members of Local 70, the only reasonable inference that can be drawn therefrom is that the Union orchestrated, induced, encouraged, and created the sick out. Instead of rebutting this testimony, Local 70 presented two witnesses, Chuck Mack and Alex Ybarraloza, who testified that the Union had indeed struck plaintiffs during the first three days of April.

The testimentary evidence establishing the April strike was fully corroborated by documentary evidence, including the following:

1. Plaintiffs' Exhibit 502 -- an emergency newsletter signed by officers of defendant describing the strike action taken by the leadership of the Union and calling for a membership meeting on the strike issue;

2. Plaintiffs' Exhibit 501 -- a declaration of James Muniz, president of defendant, stating that Local

70 took strike action to force the employers to accept their economic demands;

3. Plaintiffs' Exhibit 652 -- the minutes of the special membership meeting on the strike issue conducted on April 3, 1970;

4. Plaintiffs' Exhibit 509 -- the report of defendant's recording secretary contained in Local 70's official publication setting forth the basis for, and the duration of, Local 70's strike activity against plaintiffs.

In addition, the evidence of record clearly establishes that the strike, which was commenced by the leadership of the Union and fully ratified by its membership, continued without abatement through April 7, 1970. Notwithstanding this clear-cut evidence, defendant has adopted the position that the Union itself cannot be held responsible for the continuation of the strike on April 6 and 7. This argument is premised upon the contention that the activity on those days was not a strike, but merely "spontaneous action of the membership of the Union without sanction or approval by the local Union officers." This argument disregards the clear evidence of record, well-established principles of law, the language of the collective bargaining agreement, and common sense.

Section 501(2) of the Labor Management Relations Act, 29 U.S.C.

section 142(2), defines "strike" to include any "concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." The statute's characterization of a "concerted stoppage of work" or a "concerted interruption of operations" as a strike is in full accord with the generally accepted definition of that term. United Federation of Postal Clerks v. Blount, 325 F.Supp. 879, 884 (D.D.C) (three-judge court), aff'd per curiam, 404 U.S. 802 (1971); NLRB v. Illinois Bell Telephone Co., 189 F.2d 124, 127 (7th Cir.), cert. denied, 342

U.S. 885 (1951); Adley Express Co. v. Highway Truck Drivers, 349 F.Supp. 436 (E.D.Pa.1972); Tennessee Valley Authority v. Local Union No. 110, 235 F.Supp. 997, 1000 (W.D.Ky.1962). These cases have uniformly asserted substance over formality in considering whether or not a particular activity, such as a "sick out," constitutes a strike.

When virtually 100 percent of a work force numbering in the thousands refuses to work because of "illness," a concerted stoppage of work (i.e., a strike) has occurred. Arguments similar to the defendant's -- that the "spontaneous" and unauthorized activity of the membership absolves the Union of all liability -- have been considered and rejected. Fede[illegible] courts have long and consistently held that a union must be held accountable for the mass action of its members. *Foam & Plastic Division Tenneco Chemicals, Inc. v. General Drivers, etc.*, 520 F.2d 945 (3d Cir. 1975); *United States v. Brotherhood of Railroad Trainmen*, 96 F.Supp. 428 (N.D.Ill.1951); *Adley Express Co. v. Highway Truck Drivers*, *supra.* In *Tenneco*, the court considered a sick out similar to the one in the case at hand. The employer there was confronted with a sick out of approximately 90 percent of its scheduled drivers. The employer took the position that the action constituted a violation of the no-strike clause contained in the collective bargaining agreement[12] and initiated a lawsuit in federal court to recover damages resulting therefrom. Like Local 70, the Union defended on the ground that it could not be held accountable for such a sick out. The district court disagreed, and the Third Circuit affirmed, stating:

> Local 401 maintains that the work stoppage was purely coincidental and a case of what could be called spontaneous combustion upon the "sick" drivers. This beggars credulity. According to the well established principle of agency, a union is responsible for the actions of its officers and members .... As was said in United States v. International Union, U.M.W., 77 F.Supp. 563, 566 (D.D.C.1948), aff'd, 85 U.S. App. D.C. 149, 177 F.2d 29, cert. den., 338 U.S. 871, 70 S.Ct. 140, 94 L.Ed.535 (1949), "[M]en don't act collectively without leadership." Section 301 of

> the National Labor Relations Act, 29 U.S.C. 185(e), states: "For the purposes of this section, in determining whether any person is acting as an 'agent' of another person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."
>
> The testimony in this case establishes that on July 23, 1974, over 90% of appellant's scheduled drivers called in sick. As the District Court stated in its memorandum decision: "To ask this court to find that the absence of approximately 90% of its members on the evening of July 23 was a quirk of circumstances is absurd."

520 F.2d at 947-48.

In Eazor Express, Inc. v. Int'l Brotherhood of Teamsters, 520 F.2d 951, 963 (3d Cir. 1975), the Court of Appeals specifically reversed the district judge in holding:

> We think that there is an additional basis for upholding the finding of union liability in this case. This is the so-called mass action theory. When all the members of a union employed by a given employer engage in a concerted strike not formally authorized by the union, as happened here, many courts hold the union responsible on the theory that mass action by union members must realistically be regarded as union action. The premise is that large groups of men do not act collectively without leadership and that a functioning union must be held responsible for the mass action of its members.

The strike in the instant case was initially called by the Union on April 1, 1970. Notwithstanding that the negotiators reached a tentative settlement during the early morning hours of April 2, the leadership of the Union displayed its militancy by deciding at an executive session to continue the strike activities. To gain support for this decision, the leadership called a general meeting of the membership on April 3, 1970. At that meeting, approximately 3,000 teamsters "overwhelmingly" voted to ratify militant and maverick action of its leadership to continue the strike against plaintiffs, notwithstanding the tentative settlement. It is significant that the leadership itself called for the strike. Subsequent to that meeting plaintiffs obtained a temporary restraining order prohibiting the strike and all picketing. Defendant now contends that it was at this point in time that it absolved itself of all liability by immediately acting to put employees back to work.

Such an argument strains credulity. As will be discussed below, the leadership of Local 70, which had inflamed its membership and called the strike, was under an obligation to undertake firm action to insure that its membership returned to work. The Union has failed to prove that it did so.[13/] See Eazor Express Co., supra.

In fact, the evidence establishes just the opposite. The leadership of the Union was well aware from the tenor of the April 3, 1970, meeting that its membership was in an extremely militant mood, ready to continue its strike activities in defiance of the International Brotherhood of Teamsters. The leadership certainly was aware that several thousand of its members had voted to follow its lead and participate in the strike. With this background, common sense dictates that if the leaders of the Union had a bona fide desire to return its members to work, they would only be able to do so by calling another general membership meeting and using their authority to instruct those same people who had voted to go out on strike to return to work. The Union did not, however, choose to take this reasonable and necessary step. Instead, the leadership called a meeting of the stewards on April 4, and informed those stewards (and several hundred members in the area) to remove picket signs and instruct their people to return to work.[14/] In light of the circumstances surrounding the work stoppage, such a meeting was not reasonably calculated to end the strike. It may also reasonably be inferred that the Union had a good reason for not wishing to take firm action to end the strike. A temporary restraining order was issued during the late evening hours of April 3, 1970, over the strenuous objections of defendant. The order to show cause as to why a preliminary injunction should not issue was made returnable on the morning of April 4. It is evident to the court that the Union, in actuality, took no action whatsoever to return its people to work, but, in fact, contrived a sick out as a means of defeating the temporary restraining order until such time as the court had decided on the preliminary injunction. The court is satisfied that 4,000 employees would not "spontaneously" decide among themselves to engage in a mass sick out in defiance of the leadership's orders to return to work. At the very minimum there would have been some members desirous of following the instructions of their leaders who would have, in fact, returned to work as directed. Accordingly, it is reasonable to assume that they acted under the direction of their leaders.

Defendant also argues that the sick out was undertaken without the knowledge of the Union's leadership and that the earliest point in time any Union leader learned of the sick out occurred on the morning of April 6. The court rejects this argument outright, on the ground that it is impossible to believe that over 4,000 employees could have been informed that there was to be a sick out without the leadership of the Union learning of it. Even if the leadership of the Union had nothing to do with the sick out, it is reasonable to assume that it must have become aware of the plans. Accordingly, it should have undertaken some action to put a stop to it. Clearly, however, it did not. Even assuming that the leaders first learned of the sick out on the morning of April 6, it is clear that on that day the Union was under an obligation to put the people back to work immediately (not 48 hours after the initial occurrence of the sick out). Had the Union taken prompt action to insure that its people return to work, it could have accomplished this goal the first day. It did not choose to do so.[15/]

On April 7, 1970, the executive officers of defendant attended a meeting among the officials of the local unions comprising Joint Council 7. According to Mr. Durossette, "from this meeting, came a motion which ultimately carried, that Local 70 and 315 officers instruct their members to return to work."[16/] Having been so instructed, Local 70 leaders convened a general membership meeting attended by over 4,500 members. At this time they instructed the membership to return to work. Once so instructed, most of the membership did exactly as told and returned to work. Clearly, then, if the leadership had exercised its control and its authority on April 4, 1970, and properly instructed its members to return to work, they would have done so. By having refused or failed to take such a reasonable course of action, the Union failed to absolve itself of liability for the continuation of a strike which it had implemented.

The actual involvement and acceptance of Local 70's continuation of the strike during April 6 and 7 may be seen from the actions of the leadership subsequent to the strike.

That the leadership reimbursed individual members for their expenses relating to the "national freight strike" on April 6 and 7 and paid salaries to members for performing union services relating to the "national freight strike" on April 6 and 7 establishes clearly that the leadership of the Union ratified and approved the actions of its membership. Certainly a leadership which had taken a bona fide and good faith position that the membership had to end the strike and return to work would not have supported an unauthorized continuation of the strike by paying union monies to those who had acted in direct defiance of their officials' orders. Thus, Plaintiffs' Exhibit 528 gives great insight into the real position held by the leadership. This exhibit reflects that on May 5, 1970, four union members were dispersed checks by Local 70 under the description "gasoline for pickets--national master freight strike 4/2 through 4/7, 1970." The receipts attached to the voucher show that William Hamm was reimbursed monies spent on gasoline on April 7 while performing services on the "roving patrol"; Al Androtti received reimbursement for monies spent on gasoline on April 7 while serving on "picket patrol"; and George Hansen was reimbursed for monies expended for gasoline on April 7. All of these expenses were marked "okay" by the Union's secretary-treasurer, Al

Leishman. Plaintiffs' Exhibit 628 reflects that expenditures of the same kind were authorized by the leadership of the Union in support of the national freight strike. Thus, John Spratt was reimbursed monies expended for the strike on April 6, and M. Vierra, who described himself as a "picket captain," was also reimbursed monies spent on gasoline on April 6. In addition to these reimbursements, the Union officials also authorized salary payments to various individuals for their efforts on behalf of the "national freight strike" taking place on April 1, 2, 3, 6, and 7.[17/] Not only did the leadership of the Union support the activities of the strikers by paying them for their efforts, it also complimented them on a job well done.

The May Activity

Defendant would have the court believe that the work stoppage that occurred in May of 1970 resulted solely from the honoring of picket lines established by members of Teamsters Local 208. Defendant contends that its members did nothing more than employ their contractual right to honor the primary picket lines and that, therefore, the Union's actions were "responsible" and responsive to the obligations imposed upon it by the collective bargaining agreement. This contention is without merit. The evidence of record establishes that the Union's dissatisfaction with the national negotiations continued to grow throughout April and May; that the Union renewed its efforts to withdraw from the national settlement; that the Union notified plaintiffs and plaintiffs' bargaining agent of its demands for a separate contract; and that the union undertook strike action in an effort to force its demands upon the reluctant employers. Thus, the evidence reveals that notwithstanding defendant's clever attempts at subterfuge, Local 70 engaged in a concerted effort to force the employers out of a multi-employer bargaining unit and into the acceptance of separate collective bargaining agreements with defendant. Such action violated the no-strike provisions of the collective bargaining agreements in effect at the time.

The following evidence establishes defendant's responsibility for the work stoppage in May of 1970:

1. On April 7, 1970, at its meeting with Joint Council 7 and Western Conference of Teamsters, defendant's leaders agreed to "instruct their members to return to work with the understanding that if any additional monetary items are negotiated and given to Local 705 or 710 of the IBT, Joint Council 7 will support a strike to accomplish the same." At that meeting, the officials of Local 70 also vehemently disapproved of the language tentatively

agreed to for the supplemental agreements and requested that the "tentative agreement be thrown out and the supplement renegotiated." The recording secretary's "Report to Membership" in Plaintiffs' Exhibit 508. Clearly, then, the April strike did not result in the objectives desired by defendant.

2. On May 2, 1970, defendant called for the withdrawal of the Union from the National Master Freight Agreement and the reclamation of its power of attorney. Plaintiffs' Exhibit 606.

3. During the early morning hours of May 8, 1970, defendant's business agent, Larry Diaz, called Eddie Klug, Terminal Manager of

Sterling Transit Company, and advised him that "Local 70 is going to pull the entire Bay Area down tomorrow. We would like to sign your people up with a 'sweetheart deal' since you are a small carrier." Diaz went on to state that in the event such a contract was signed he would make sure the company continued to work. After being informed by Klug that the California Trucking Association held the company's negotiating powers, Diaz stated, "It's a damned shame to Sterling to lose all of that money." The following morning Sterling's Local 70 employees commenced picketing with altered Local 70 strike signs. Reporter's Transcript, Volume 2, pages 273-276.

4. During the evening hours of May 7, 1970, the then Local 70 business agent, Chuck Mack, notified Fred Caudill of IML Freight, Inc. (as he did in April) that he, Mack, would inform Caudill in the event he was going to pull the Local 70 people out again. Later that evening, Mack called back and told Caudill, "Fred, we're pulling them out again." Caudill immediately went to the terminal and observed that all of the dock employees were dressed in non-working attire. He also observed Business Agent Mack arrive at the terminal and pull the Local 70 employees off their jobs. At the time Mack initiated this work stoppage, there were no pickets present at the

terminal. Not only did the night shift employees pulled off the job by Mack remain away from their work, none of the day shift reported for their normally assigned tasks. Again, there were no pickets present at the start of their shift. Reporter's transcript, Volume 2, pages 352-354. At approximately 7:30 a.m. on the morning of May 8, Caudill had another conversation with Mack wherein he asked for a status report and inquired whether or not the strike was sanctioned. After meeting briefly with a group of IML employees, Mack said, "No, we're not allowing them to come in for work today." He said this at a time when no pickets were present. In fact, all of the above activity occurred prior to the time pickets arrived on the scene. Reporter's Transcript, Volume 2, pages 362-363.

5. On May 8, 1970, Local 70 sent a letter to each employer operating within its jurisdiction stating that the Union was prepared to negotiate the terms and conditions of the Supplemental Agreement. Letter attached to affidavit of Harding submitted with plaintiffs' memorandum on April 30, 1975.

6. On May 9, 1970, defendant's Executive Board unanimously carried a motion to take any and all avenues, present or future, to withdraw the Union from the National Master Freight Agreement and the Joint Council 7 Supplement. Plaintiffs' Exhibit 606.

7. On May 12, 1970, at a meeting designated by the recording secretary as a "special meeting on strike," the president of the local informed membership that "there was no signed contract, Master or Supplement," and that he, a man elected to office, could not "just sit idly by and watch while people sign away the rights of the membership for life." Muniz went on to state that he "felt that it was his sworn duty to do all in an effort to maintain the rights of this local and its membership"; and that the Union was "at the point of no return, either we fight now or we will be bound for life." After each official had declared his reason for taking the announced position, the

membership ratified the action of the Executive Board. Plaintiffs' Exhibit 506.

8. On May 13, 1970, defendant's secretary-treasurer and president directed a letter to General Vice President Fitzsimmons notifying the International that the local believed that it was not bound by any of the negotiated collective bargaining agreements and that the Union would "exhaust all peaceful legal limits open to us" and "reserve the right to take appropriate action to enforce our lawful demands dealing with the requests of the membership of Local 70." Letter attached to Harding's affidavit filed with memorandum on April 30, 1975.

9. On May 14, 1970, defendant received confirmation of the delivery of a telegram sent by defendant's president to Mr. Owens of the Building Trades in Stockton, California, saying, "Teamsters Local 70 on strike against all trucking terminals. Request your support and sanction." Plaintiffs' Exhibit 574.

10. During the relevant period, President Muniz arrived at the DiSalvo Trucking terminal in San Francisco with a carload of Local 70 members. On their arrival, the Local 70 people, in the presence of their president, commenced picketing the San Francisco terminal of DiSalvo. The members were carrying picket signs which stated that Teamsters Local 70

was on strike. While the pickets were parading in front of DiSalvo's terminal, Muniz informed Charles Lawlor of that company that there was no way that he, Muniz, would live under the new contract. Reporter's Transcript, Volume 1, pages 34 through 36(a).

11. On May 14, 1970, Frank's Trucking was subjected to picketing by persons carrying Local 70 strike signs altered to read "208." Not having any operations in Los Angeles within the jurisdiction of Local 208, and not having any bargaining relationship with that union, Frank Teixeira of the company spoke with Business Agent Larry Diaz of Local 70 by telephone and was informed that if he forgot about the California Trucking

Association, came down to the Union hall and signed a separate sweetheart deal, Local 70 would pull the pickets. Teixeira refused to do this and the pickets remained at his terminal. Around May 27, Teixeira visited with Muniz and asked what it was going to take to get the pickets moved off his property. Muniz responded, "You sign the separate agreement." When Teixeira responded that he couldn't do it, Muniz said, "Well, you will be shut down."[18/] Subsequent thereto, Business Agent Diaz met with Teixeira and his attorney. At this point Diaz was asked by the attorney, "What can we do to pull the picket line?" Diaz responded, "Well, you've got to sign a separate agreement." When Teixeira finally capitulated and signed a separate agreement (Plaintiffs' Exhibit 560), Diaz immediately stopped by the terminal, removed the pickets, and allowed the employees of Frank's to return to work. Reporter's Transcript, Volume 1, pages 210-211.

12. During the early morning hours of May 8, 1970, Garrett Freightlines was subjected to picketing. One of the pickets advised James Severion of the company: "I'm here because there is no contract and I have been told to be here, and until someone tells me different, I'm going to stay here."[19/] Shortly thereafter, Business Agent Riga, in the presence of Local 70 members, informed Severino that since there was no contract in

effect, the Union did not have a contract and, therefore, could not work. Severino went on to say that California Trucking Association had the power of attorney for Garrett and that he did not understand how Local 70 could get the company back to work if 208 was picketing. Riga laughed and said, "We'll see about it." Subsequent thereto, Riga, on several other occasions, brought up the topic of the sweetheart agreement. One time he said, "Everybody sign the sweetheart deal, let's get aboard the band wagon, let's not be the last one. Why be left out in the cold? Let's get inside and sign it now and we'll get you back to work." Reporter's

Transcript, Volume 2, pages 256, 261-264.

13. On May 8, 1970, Navajo Freightlines was picketed by individuals carrying Local 70 signs altered to read "Local 705." Notwithstanding that Navajo had no bargaining relationship with Local 705, members of Local 70 left the job. On May 11, no pickets were present at Navajo's terminal at the normal starting time for the day shift. Notwithstanding that fact, the Local 70 members refused to punch in and begin work. The shop steward informed the company that employees had no authorization to start. Approximately an hour later, the pickets arrived. Clearly, these employees were under orders from their

union not to work during this period of time. This may be seen from the fact that although at other times during the period in question, there were no pickets present at Navajo's terminal, Local 70 members nonetheless refused to work. Reporter's Transcript, Volume 1, pages 172, 174-177.

14. Throughout the period in question, the San Francisco terminal of CME/CMT was picketed by members of Teamsters Local 70 carrying the altered Local 70 signs. Among the pickets were defendant's two shop stewards assigned to the company's Oakland facility. President Muniz of Local 70 was observed talking with his members while they were picketing. These members continued picketing

after talking with Muniz. Obviously, the leader of Local 70 was satisfied with their conduct. Reporter's Transcript, Volume 3, pages 376-377, and Volume 4, page 507.

15. On the morning of May 7, Local 70 Business Agent Larry Diaz arrived at CME/CMT's Oakland facility and pulled the Local 70 employees off their jobs by saying, "Hit the bricks, go out into the street." Diaz then informed the company's terminal manager that "We're shutting you down." When asked why, he said, "That's my orders from the Union, to shut you down, pull the people out on the streets, stop working." After all the employees had left their jobs, Diaz left. He returned several hours

later, however, and informed those employees who were still outside of the gate, "There has been a mistake, we're supposed to work today. Let's all go back to work." After some discussion most of the employees did return to their jobs. At approximately midnight on May 8, the Local 70 employees once again left their jobs. As before, there were no pickets of any kind present in the area at the time they stopped work. That morning Supervisor Wright spoke with the shop stewards and asked them what was going on and was inforred that the employees had their orders not to come to work. They said that although they would like to work, Local 70 would not let them. Wright then spent an entire week attempting to contact an official of Local 70 to gain some assistance. At no point was he allowed to talk with any official, and no official returned his call. That was the first time that had ever happened to him. Reporter's Transcript, Volume 4, pages 449-458.

16. During the early morning hours of May 8, 1970, members of Local 70, including a shop steward, commenced picketing the Oakland facility of Delta Lines. These members of Local 70 carried Local 70 strike signs that had the number altered. The company's terminal manager attempted to reach Local 70 to find out why the company was being picketed by Local 70 members; however, no union official

ever responded to or returned his telephone calls. After Local 70 members had picketed the terminal for approximately a week, Business Agent Lou Riga of Local 70 arrived at the terminal. There, he told Delta's representatives, "I've been told to tell you that if we don't have a contract, we will not work." When Delta's representative protested that there was a contract in effect, Riga said, "That's what I've been told by my superiors: No contract, no work." Reporter's Transcript, Volume 5, pages 642-649.

17. On May 13 or 14, Jack Sutherland of Haslett Company spoke by telephone with Local 70's business agent, Ed Painter. During the course

of this conversation, Sutherland asked Painter what Haslett would have to do in order to get rid of the pickets. Painter responded, "Well, it's a very simple thing: Just sign this special contract and the pickets will be removed." Sutherland refused, and the picketing continued. Reporter's Transcript, Volume 1, page 49. The picketing at the terminal was conducted by Local 70 members. Reporter's Transcript, Volume 5, page 776.

18. On May 8, 1970, Local 70 employees of DiSalvo established a picket line at the Oakland facility of DiSalvo. These members of Local 70 were carrying Teamster Local 70 strike signs which had the numbers altered to read "208." During a meeting with the

picketing employees, the company's president, Charles Lawlor, was informed by a Local 70 shop steward, Lacey, that Local 70 had instructed them to picket the company on behalf of Local 208. Lawlor then told the shop steward, "You better get hold of Mr. Muniz and tell him he goofed, that he's picking on the wrong company. We don't have a contract with 208." Lawlor went on to say that the company's contract in Los Angeles was with Local 396. Lacey left but returned later to inform the still picketing employees that they had to go back to work since there had been a mistake. The shop steward did, however, inform Lawlor that in a short period of time the company would have Local 396 pickets up for its convenience. On May 11, the picket line was reestablished by the Local 70 members who, this time, carried Local 70 signs altered to read "396," "106," and "170." Reporter's Transcript, Volume 1, pages 17-19, and 21-22.

19. During the period in question, a picket line was established at the Oakland facility of Seatrain by individuals carrying picket signs stating that Local 208 was on strike. At the time Seatrain was a large customer of Alltrans Express. Shortly after the picketing commenced, Alltrans, Seatrain, and Local 70 struck an agreement whereby Alltrans would transfer its employees to Seatrain, who would sign a separate

agreement with Local 70. Once this had been accomplished and Seatrain had signed the separate contract with Local 70, the pickets carrying the 208 signs disappeared from the Seatrain premises. Reporter's Transcript, Volume 6, pages 1060-1064. Once again, it is obvious that Local 70 had absolute control over the pickets. Once a company signed a separate agreement with Local 70, the picket line was removed and the company was allowed to operate.

20. On May 12, 1970, the employees of Lodi Express refused to perform their work. There were no pickets present at the facility. In addition, at other times during May, the company was picketed by unknown

individuals carrying the altered Local 70 strike signs. This occurred notwithstanding that Lodi did not operate within Local 208's jurisdiction and employed no 208 members. Reporter's Transcript, Volume 5, pages 821, 855.

21. On May 13, 1970, members of Teamsters Local 70 began picketing Morris Drayage Company with Teamsters Local 70 strike signs altered to read "208." This occurred notwithstanding that Morris Drayage Company did not have a bargaining relationship with Teamsters Local 208 and did not employ any 208 personnel. Reporter's Transcript, Volume 1, pages 131-136.

22. On May 8, 1970, members of Teamsters Local 70, including the shop

steward, commenced picketing the Hayward facility of Yellow Freight with altered Local 70 strike signs. The signs had the numbers changed to read "208." This picketing by Local 70 members took place notwithstanding that at the time Yellow Freight had no bargaining relationship with Teamsters Local 208 and did not employ any Local 208 members. Reporter's Transcript, Volume 2, pages 297-300.

23. During the period in question, Coast Drayage was picketed by persons carrying Local 70 signs altered to read "208." At the time this picketing took place, Coast Drayage had no operations in the Los Angeles area and had no bargaining relationship with Local 208 and did

not employ any Local 208 members. Testimony of Tom Ornellas.

24. On May 8, 1970, two individuals arrived at the Oakland facility of Associated Freight Lines carrying Teamster Local 70 picket strike signs which had been altered to read "208." At the time the pickets appeared, all of Associated's 208 employees were working in Los Angeles, and Associated had no dispute with the union or its members. Shortly thereafter, defendant's business agent, Alex Ybarralloza, pulled the Local 70 employees off the job. In response to a question by Supervisor Raphael as to what was transpiring, Ybarralloza stated, "Screw you. We've just shut down your terminal and you're going to

stay down." The picketing continued for a period of time in excess of a week. During that time various members of Teamster Local 70 participated in the picketing. Reporter's Transcript, Volume 5, pages 706-709; Volume 4, pages 545-546.

25. On May 13, 1970, an individual came into the San Francisco terminal of Associated Freight Lines and informed the men working there that Local 70 was on strike and was setting up a picket line in front of the terminal and that, therefore, all members of Local 85 had better quit and recognize the picket line. Approximately 10 to 15 members of Teamster Local 70 situated themselves in front of the gates to the company's

facility carrying altered Local 70 strike signs. The Local 70 pickets remained at the facility carrying the strike signs throughout May 13, 14, and 15. Reporter's Transcript, Volume 5, pages 711-716.

26. On May 8, 1970, members of Teamsters Local 70 established a picket line at the San Francisco facility of Pacific Motor Trucking. One of the individuals establishing the picket line was a shop steward for defendant assigned to Pacific Motor Trucking's Oakland facility. The Local 70 members maintained their picket line at the San Francisco terminal through at least May 18, 1970. When the Local 70 shop steward established the picket line, the

terminal manager for PMT asked him, "What the hell is going on?" The shop steward responded, "We've got a Local 70 sanctioned strike." Reporter's Transcript, Volume 2, pages 242-248.

27. On May 18, 1970, George Helwig, Oakland terminal manager for Pacific Motor Trucking, spoke with Local 70 business agent, Chuck Mack, regarding delivery of perishable freight. During the course of the conversation, Mack informed Helwig that Local 70 had negotiated some separate contracts with other carriers and asked PMT to do the same so that Local 70 could get its people back to work. When Helwig responded that he had no authority to do so, Mack again stated that if the company signed a

separate contract with Local 70 and gave Local 70 people amnesty for not working, Local 70 would remove the picket line and allow employees to return to their jobs. Reporter's Transcript, Volume 2, pages 190-197.

28. During the early morning hours of May 8, 1970, members of Teamster Local 70 established a picket line at the Alameda County facility of Consolidated Freightlines. As soon as the Local 70 members had established this picket line, the Local 70 shop stewards for Consolidated went through the terminal and ordered all of the Local 70 employees then working to leave their jobs. This is exactly the same procedure which took place on April 1, 1970. The picket line was

maintained by the Local 70 members through at least May 18, 1970. Reporter's Transcript, Volume 1, pages 22-27 and 47-55.

29. Commencing on May 12, 1970, Consolidated Freightlines' terminal in San Jose was picketed by individuals carrying altered Local 70 strike signs. All of the pickets were Local 70 employees of Consolidated stationed at the Hayward terminal. One of the pickets was the shop steward for Local 70 at the terminal. Reporter's Transcript, Volume 1, pages 102-106.

30. On May 12, 1970, a picket line was established at Crescent Truck Lines by individuals carrying altered Local 70 strike signs. Some of the

altered signs had a telephone number to call for information. This telephone numbers was the same as that for Teamster Local 70's offices. At the time the picketing was conducted, Crescent had no labor dispute with Local 208 in Los Angeles and all of its Local 208 employees were then working. Reporter's Transcript, Volume 2, pages 271-275.

31. During the May picketing at IML, Business Agent Mack advised IML supervisor Caudill that other carriers had signed a sweetheart agreement and it would be wise if the company's director of labor relations was contacted about entering such an arrangement. Reporter's Transcript, Volume 2, page 364.

32. During the period in May relevant to this lawsuit, defendant paid salaries to various members for thier work on the "national master freight strike."[20/] Plaintiff's Exhibits 593,595, 596, 597, 599, 601, and 602.

33. During the period in May relevant to this lawsuit, defendant reimbursed numerous members for expenses relating to the "national master freight strike" or "national master freight." Plaintiff's Exhibits 598, 608, 616, and 617. Of particular interest is the manner in which the members have described their roles. Thus, in Plaintiffs' Exhibit 598, Paul Geurard was reimbursed for "delivering pickets to the line" and "picking up

pickets" on May 10 and 11; John Resents stated he was a "Local 70 picket" in the "national master freight strike" on May 18; and Joe Puetz was a "roving picket" on May 19.

The above evidence establishes that Local 70 was responsible for the work stoppages that took place during the month of May, 1970. In its brief defendant comes close to acknowledging this fact. Thus, the Local states, "If Local 70 had invited the pickets from Los Angeles [Local 208], had made demands upon each one of the employers involved herein that they sign separate agreements, had taken an active role in ordering its men not to work, and had made an effort to insure that other unionized members not work, there might be some credence to plaintiffs' claim."[21/] Since the hypothesis suggested by defendant is exactly what the above evidence reveals, defendant, under its own argument, is liable for breach of contract. The evidence may not reveal that Local 70 sent emissaries to Los Angeles to "invite" Local 208 pickets into the Bay Area. But the evidence does establish that the enthusiastic reception and massive assistance rendered to the wildcat 208 members was not only "inviting" but made their very actions in the Bay Area possible. At some point in time an accord was struck whereby Local 70 agreed to finance a strike.[22/] Clearly, this was an open invitation to picket within Local 70's jurisdiction.[23] The above evidence also establishes that officials of the Union did, indeed, make numerous demands upon the employers that they sign separate agreements as a condition of returning to work, took an extremely active role in ordering their men not to work, and through the use of pickets, made a concerted effort to insure that other unionized members did not work. Accordingly, the court finds that Local 70 engaged in, and is responsible for the strike in May, 1970. As the court hereinabove noted in its discussion of the April 1 through April 8 activity, the concerted mass action of defendant's members in honoring an unlawful picket line[24] constituted a strike in breach of the collective bargaining agreement.

In addition, the evidence of record establishes that the activity of Local 208 was a wildcat strike. Plaintiffs' Exhibit 578 is a telegram from the secretary-treasurer of Local 208 to the secretary-treasurer of Teamsters Local 70 stating that, "Any picketing or interference in your area by anyone claiming to be associated with Teamsters Local 208 is not sanctioned or implicated with Teamsters Local 208 in any way or manner." Plaintiff's Exhibit 507 is a telegram from General Vice President Fitzsimmons stating, "Neither Joint Council 42, the Western Conference of Teamsters, nor the International

Brotherhood of Teamsters has authorized any strikes or picket lines by Local 208 or any other local union in connection with the negotiation of the National Master Freight Agreement, or supplements or riders thereto." Defendant itself admits that dissident members of Temasters Local 208 engaged in a wildcat strike to seek amnesty for a number of employees fired during a strike which took place in April 1970.[25/] Since the strike which gave rise to the picketing at plaintiffs' terminals in May of 1970 was an illegal strike and was not protected by the act, the picketing which accompanied that strike and which was in support of that strike was also illegal. Accordingly, the mass honoring of the illegal picket line allegedly established by the Local 208 dissidents was not protected by Article 9 of the Master Agreement. Having lost its protection, the concerted work stoppage resulting from the mass refusal to cross the picket lines becomes a strike in violation of the no-strike clauses of the agreements. Because of the mass nature of the action of the membership, as well as the ratification of it by the leadership of the union, Local 70 is responsible for the damages resulting therefrom.

In addition to the fact that the picket line was unlawful because it was in support of a wildcat strike, the activity of defendant's members in

May was unprotected by Article 9 of the Master Agreement for two other reasons: (1) The picketing activity was properly enjoined by the Superior Court in and for the County of Alameda, State of California, and, thus, was unlawful; and (2) much of the picket line activity was illegal secondary activity. Defendant's Exhibit 208 establishes that on May 9, 1970, representatives of plaintiff obtained a restraining order prohibiting all picketing with Local 208, 170, 705, etc, picket signs. There can be no question that, as of that morning, the picketing was unlawful.[26]

There is also no question that much of the picketing which took place was secondary in nature since the employer was being picketed extensively by individuals representing Teamsters locals with which the companies had no bargaining relationship or any dispute. Thus, the picketing was secondary in that it was designed to induce or encourage employees of these neutral employers to engage in a work stoppage with the objective of forcing those neutral employers to become embroiled in the dispute. Thus, Article 9 is inoperative as a defense for the work stoppages which took place at Frank's Trucking, DiSalvo Trucking, Lodi Trucking, Morris Drayage, Yellow Freight, and Coast Drayage, none of which had bargaining relationships with Teamsters Local 208. In addition, much of the picketing was on behalf of bogus unions (such as 170, 701, 705, etc.), with which the companies being picketed had no bargaining relationship. Once the members of Local 70 engaged in their unlawful concerted work stoppage by refusing en masse to cross the unlawful picket lines established, they plighted their troth with the strikers, took up their dispute by joining their common cause, and thus became strikers themselves. Such action clearly violates the non-strike provisions of the collective bargaining agreement and makes Local 70 responsible for all damages arising therefrom.

Not only is defendant liable for the damages resulting from the concerted work stoppage of its members in May, it is also liable because it did not make a good faith effort to return those employees to work once it was determined that the picketing activity of the Local 208 dissidents was an unlawful wildcat action not protected by Article 9 of the collective bargaining agreement.

Other Issues

The remaining issues urged by defendant are, in the court's view, minor in nature or have already been ruled upon adversely to defendant. Hence, the references thereto will be brief.

Defendant's attempt to apply the statute of limitations to the Second Amended Complaint and its request for mandatory joinder of the International Brotherhood of Teamsters were fully litigated before and the court has consistently denied such motions. Defendant has produced no new evidence or case law which would justify the court in changing its position.

Defendant again states that this court does not have jurisdiction over some of the plaintiffs because they are not engaged or involved in interstate commerce. Again, defendant conveniently chooses to ignore its response to plaintiffs' request for admissions dated June 10, 1974, wherein defendant admitted that, "At all times relevant to this lawsuit, plaintiff and plaintiffs' interested members [now plaintiffs] were engaged in commerce as that term is defined by section 2(6) of the Labor Management Relations Act (29 U.S.C. § 152(6))." Having thus admitted that all plaintiffs were engaged in commerce, it is spurious for defendant to now allege that plaintiffs have failed to prove that all of the carriers were involved in interstate commerce. To put this issue at rest the court specifically finds that plaintiffs and each of them were at all relevant times engaged in "commerce" as that term is defined in section 2(6) of the Labor Management Relations Act.

Equally spurious is defendant's contention that Pacific Motor Trucking is subject to the provisions of the

Railway Labor Act, since it is owned by Southern Pacific. Merely because one corporation which is covered by the Railway Labor Act owns and operates another corporation does not mean by itself that the subsidiary is governed by the Railway Labor Act regardless of the type of business conducted. Thus, if Trans World Airlines owned a hotel, the employment practices of that hotel would not be governed by the Railway Labor Act simply because TWA was. Since PMT is not engaged in an industry covered by the Railway Labor Act, it is not covered by the Railway Labor Act.

The evidence is clear that the union engaged in a strike against Crescent Truck Lines in violation of its collective bargaining agreement. Defendant's Exhibit A-200 establishes that Crescent Truck Lines and defendant agreed to be bound by the terms and conditions of the 1967-1970 agreements. Article 31 of the Master Agreement, which Crescent agreed to accept, provides:

> The undersigned Employer agrees to become a part of the multi-employer unit established by this National Master Agreement, and to be bound by the interpretations and enforcement of this National Master Agreement.
>
> The Employer further agrees to participate in joint negotiations of any modification or renewal of this Agreement and to remain a part of the multi-employer unit set forth in such renewed Agreement.

When Crescent signed a sweetheart contract with Local 70, it became a part of the multi-employer bargaining unit and was fully represented by Trucking Employers, Inc. during the negotiations for the 1970-1973 amendments. Even if this were not true, when Crescent and defendant accepted the terms and conditions of the National Agreement, they agreed to be bound by the term of the contract as set forth in Article 37. Since neither Crescent nor the defendant gave notice of an intent to terminate the contract, it remained in full force and effect at least during the first week of April when the strike took place. Thus, Crescent Truck Lines did indeed have the same collective bargaining agreement as did all the other plaintiffs. Accordingly, defendant's strike was a breach of the no-strike obligations imposed by that contract.

Defendant's arguments regarding California Motor Express/California Motor Transit, Alltrans Express, and Valley Copperstate are in conflict with the evidence of record and are rejected. The testimony of Ward Walkup, overlooked by defendant, establishes that in April and May of 1970, Walkup's Merchant Express was a corporation whose stock was owned by Alltrans Express. During April and May of 1970, the company was operated under the name of Walkup's Merchant Express. Shortly after that period of time, the name of the corporation was changed from Walkup's Merchant Express to Alltrans Express. No change of ownership took place. Reporter's Transcript, Volume 1, pages 59-60. Thus, plaintiffs have established that Alltrans Express is the same corporate entity owned by the same corporation defendant has admitted was party to the 1967-1970 National Master Freight Agreement. Accordingly, Local 70 did not have the absolute right to engage in economic activity as suggested by defendant. Likewise, the testimony of Wayne Varozza establishes that CME/CMT is entitled to recover damages sustained as a result of defendant's breach of the collective bargaining agreement. California Motor Express and California Motor Transport are both California corporations. One hundred percent of the stocks of both corporations is owned by the same corporate entity, the corporations have the same officers, and the same directors. The two corporations combine as a single entity to operate as a single integrated transportation service. All of the employees are on the payroll of CMT, the equipment is in the name of CMT, and the terminals are in the name of CME. The combined operation operates under the name Cal Motors. The companies file combined PUC reports, ICC reports, and tax returns. Revenues generated by the combined operation are split between the two companies, which maintain separate books. The two companies are treated as one by the California Trucking Association and only one set of dues is paid to the Association. The original complaint stated that the California Trucking Association was authorized to bring this suit on behalf of all of its members. The First Amended Complaint refers to California Motor Transport as an interested member. The Second Amended Complaint names California Motor Express/California Motor Transport as a plaintiff. Thus, at the time the original complaint was filed, defendant was put on notice that all of the members of the California Trucking Association were potential claimants. When California Motor Transport/California Motor Express was identified in the Second Amended Complaint, there was no detriment or surprise to defendant. At the time the Second Amended Complaint was filed, the relation back doctrine of Rule 15(c) took effect, thereby obviating any statute of limitations problems. Both corporations, although they operated as a single entity, are properly before the courts as plaintiffs and are fully entitled to recover.

The same reasoning applies to the situation involving East Texas Motor Freight, which is the successor to Valley Copperstate. The evidence of Mr. Danza with regard to these companies is clear. Danza testified that the company called Valley Copperstate was purchased in 1962 by Valley Motor Lines. In 1969, East

Texas Motor Freight agreed to purchase Valley Copperstate. During April and May of 1970, East Texas Motor Freight not only owned but was operating Valley Copperstate. Being the real party in interest, East Texas Motor Freight, properly named in the First Amended Complaint and the Second Amended Complaint, as such is fully entitled to recover the damages sustained in April and May of 1970.

Compensatory Damages

Under section 301 of the Labor-Management Relations Act, as amended, an employer is entitled to recover all damages reasonably incurred as a result of work stoppage by a union in breach of the provisions of the collective bargaining agreements.

Blue Diamond Coal Co. v. United Mine Workers of America, 436 F.2d 551, 561 (6th Cir. 1970), and _Wilson & Co. v. United Packinghouse Wkrs. of America_, 181 F.Supp. 809 (N.D. Iowa 1960). The standard for the measure of damages was set forth by the court in _Wilson & Co._, _supra_, as follows:

> In an action against a union under Section 301 for damages caused by a breach of a no-strike provision in a contract, the measure of damages recoverable is the actual loss sustained by the plaintiff as a direct result of the breach ... Such loss would be that which may reasonably and fairly be considered as arising naturally from the particular breach of contract involved and which may reasonably be supposed to have been in the contemplation of the parties at the time of the agreement was entered into in the event of such violation.

181 F.Supp. 809, 820-21.

Based on this standard it is clear that the items which compose "actual loss" include: (1) overhead expenses not compensated by productivity; (2) loss of profits; (3) extraordinary expenses necessitated by strike activity; and (4) lost profit and overhead contribution attributable to customers lost as a direct result of the strike.

It is well settled that a plaintiff in a section 301 suit may recover overhead expenses allocable to operations closed by the illegal work stoppage. United Electrical, Radio & Machine Workers of America v. Oliver Corp., 205 F.2d 376 (8th Cir. 1953); Structural Steel & Ornamental Iron Association of New Jersey, Inc. v.

Shopmens Local Union No. 545, 172 F.Supp. 354 (D.N.J.1959). The reason such damages are recoverable is that the overhead expenses are incurred by an employer even though there is no revenue produced to effect them. In discussing the relationship between overhead expenses and the resulting damage to an employer from an illegal strike the Eighth Circuit in United Electrical, Radio & Machine Workers of America, supra, articulated as follows:

> Overhead expense is the necessary cost incurred by a company in its operations which can not be easily identified with any individual products and which by accepted cost accounting procedure is spread over or allocated to the productive labor, which is labor performed in the processing of the company's products. Such expenses do not fluctuate

> directly with plant operations. They are expenses necessary to keep the company on a going concern basis and are based upon the company's production which is planned for a year in advance. They are constant regardless of fluctuations in plant operations. When productive labor in a plant is reduced for any period to less than the normal, the company sustains a loss in the expenditure of the necessary overhead for which it receives no production.

205 F.2d 376, 387.

An employer is entitled to recover loss of profits, present and future, occasioned by a strike or violation of collective bargaining agreements. Blue Diamond Coal v. United Mine Workers of America, supra; International Union of Operating Engineers, Local 653 v. Bay City Erection Company, Inc., 300 F.2d 270 (5th Cir. 1962); United Electrical

Radio & Machine Workers of America v. Oliver Corp., supra; Roadway Express, Inc. v. Highway Truck Drivers and Helpers, Local No. 107, 299 F.Supp. 1058 (E.D.Pa.1969); W.L. Mead, Inc. v. International Brotherhood of Teamsters, 129 F.Supp. 313 (D.Mass.1955).

The court further notes that this court has previously held that overhead expenses, lost profits, extraordinary expenses, and lost contributions to overhead resulting from customer loss are fully recoverable in a section 301 action. In Associated Freight Lines v. Brotherhood of Teamsters & Auto Truck Drivers, Local 85, Civil No. 48970-GBH, Senior Judge Harris adopted as the decision of the court findings of the special master which specifically included recovery of the aforementioned items of damages. This decision was affirmed by the Ninth Circuit Court of Appeals in an unreported decision on April 18, 1973.

In ascertaining the amount of damages, it is sufficient that the extent of damages is shown by reasonable inference. The risk of uncertainty as to the amount of damages rests upon the wrongdoer and not upon the injured party. Blue Diamond Coal Co. v. United Mineworkers, supra; International Union of Operating Engineers, Local 653 v. Bay City Erection Co., Inc., supra; United Electrical Radio & Machine Workers of America v. Oliver Corp., supra.

Likewise the wrongdoer has the burden of establishing matters asserted by it in mitigation or reduction of damages. Roadway Express, Inc. v. Highway Truck Drivers and Helpers, Local No. 107, supra. Thus, once the fact of damages has been shown, "uncertainty as to their amount will not foreclose recovery." Flame Coal Company v. United Mine Workers of America, 303 F.2d 39, 44 (6th Cir. 1962), cert. denied, 371 U.S. 891 (1963).

The court is satisfied and finds that the damages suffered by each of the plaintiffs in the instant case was proximately caused by defendant's breach of the collective bargaining agreements. As will hereinafter appear, witnesses from each of the plaintiff companies involved in this lawsuit testified as to the exact dates their particular companies were subjected to defendant's unlawful conduct, and as to the effect such wrongful conduct had upon the operations of the companies. In addition to these witnesses the plaintiffs presented an expert witness, John R. McKean, Certified Public Accountant, who by reason of his experience and expertise in the trucking industry was eminently qualified to testify and testified as to the precise damages occasioned by defendant's unlawful strike activity. Mr. McKean's testimony was predicated upon his damage calculations allocating to each affected terminal of plaintiffs the loss of overhead or fixed expenses not compensated by productivity,[27/] the loss of profits, the loss of profits and overhead contribution attributable to customers lost as a direct result of the strike, and all extraordinary expenses necessarily incurred as a result of the strike activity.

A company-by-company synopsis of this evidence as it relates to the damages proximately caused by defendant's breach of the collective bargaining agreement follows.

Associated Freight Lines

The testimony of John Pifer, Nate Rook, and Roy Raphael establishes defendant's liability with regard to

Associated Freight Lines. A summary of this testimony follows.

During the spring of 1970, Associated Freight Lines was an inter- and intrastate carrier employing approximately 270 persons and utilizing approximately 450 pieces of equipment. The company had terminals located throughout California, the largest Northern California terminal being located in Oakland. At that time the Oakland facility had approximately 54 employees, approximately 42 of whom were represented by defendant, and operated on a five-day per week, 24-hour per day basis and employed approximately 30 teamsters represented by Teamsters Local 85.

At approximately 8:00 a.m. on April 3, 1970, a picket line was established at the gates of Associated's Oakland facility. This picket line was comprised of Associated's Local 70 employees carrying picket signs stating "Teamsters Local 70 on Strike." Shortly after this picket line was established, a representative of defendant, Shop Steward Tom Tilley, informed Mr. Raphael that the Local 70 employees could not go to work because defendant had called a strike. As soon as the picket line had been established all employees who were then working walked off the job, and not one day shift employee who was a member of Local 70 reported for work. As a result all revenue-generating operations within the terminal came to a complete standstill. This picket line remained at the facility throughout the remainder of April 3, 1970. By Monday, April 6, 1970, the picket line had been removed at Associated's Oakland facility. Prior to the start of the graveyard shift, however, during the early morning hours of April 6, Associated's Oakland supervisors began receiving telephone calls from the Teamster employees advising the company that those employees were ill and would be unable to report for work that day. These telephone calls continued throughout April 6 and 7. During those two days not one Teamster Local 70 employee reported for his normally scheduled work shift. As a direct result of the refusal of these employees to report to work, the work stoppage (and, thus, cessation of revenue-generating operations) that began on April 3 continued unabated through April 7, 1970. It was not until the morning of April 8, 1970, that Associated's Teamster employees began to return to work.

At approximately 12:15 a.m. on May 8, 1970, two unknown pickets arrived at the Oakland facility carrying Teamster Local 70 picket signs which had the "70" altered to read "208."[28/] Shortly after the pickets arrived, Local 70's business agent, Alex Ybarralloza, arrived at the terminal and called all of the

Local 70 employees then working away from their jobs for a meeting. After the meeting was completed, Ybarralloza informed Rook that Local 70 was standing behind brother members, would not let its own members work behind picket lines, and was therefore pulling the men off of the job. When Rook responded that the president of the company, John Pifer, desired to talk with Ybarralloza, the business representative refused to do so, stating that "Pifer is going to pull the same shit here as he pulled in Los Angeles." Ybarralloza then repeated that he was pulling the men off the job and closing the terminal down. Immediately thereafter Local 70 employees "punched out" and left the premises. A short time later, in response to a question by Mr. Raphael as to the basis for the events which were transpiring, Ybarralloza stated, "Screw you. We've just shut your terminal down and you're going to stay down." As a result of the fact that the Local 70 employees walked away from their jobs, all revenue-generating operations of the company came to a halt.

This "shut down" or work stoppage continued without interruption through May 15, 1970. Throughout that entire period pickets were located at the Oakland facility carrying "Teamster Local 70 on Strike" signs with the number "70" altered to read "170," "701," etc. At various times members of Local 70 who were not employees of Associated Freight were observed participating in the picketing activity and carrying the altered signs. The work stoppage resulted in a cessation of all operations during the affected period.

On May 13, 1970, an individual came into the San Francisco terminal of Associated and informed the men that Local 70 was on strike and was setting up a picket line in front of the terminal and that therefore all members of Local 85 had better quit and recognize the picket line. When it was observed that 10 to 15 members of Teamsters Local 70 had situated themselves at the gates to the company's facility and were carrying the altered Local 70 strike signs, the work force left the docks and all work ceased. These members of Local 70 maintained their picket line at the San Francisco facility without interruption throughout May 13, 14, and 15, 1970. During that entire period of time all union employees of the company assigned to the San Francsico terminal refused to cross the picket line. As a result of this Local 70 induced work stoppage, no revenue-producing operations were conducted from May 12 through May 15, 1970.

The evidence presented by Mr. McKean fully corroborates the testimony of the company witnesses that the work stoppages precipitated by Local 70 brought about a cessation of revenue-producing operations at the Oakland facility on April 3, 6, and 7, May 8, and May 11 through 15, and on May 13 through 15, 1970, at the San Francisco facility. The summary of Mr. McKean's computations, attached hereto as Exhibit 1, establishes that Local 70's work stoppage against Associated Freight Lines proximately caused damages in the amount of $34,636. Mr. McKean's analysis and calculations pertaining to Associated's losses are contained in plaintiffs' Exhibit 541.

[We have deleted the remainder of the district court's opinion which recites the factual findings as to each company.

The Opinion is reported at 94 LRRM 2981.]

CONCLUSION

Based on the foregoing, the court finds and concludes that plaintiffs have sustained their burden of proving that defendant breached the collective bargaining agreements in effect between the parties and that as a direct and proximate result thereof, each plaintiff has sustained damages in the amount set forth hereinabove and in the summary of computations attached hereto. Accordingly, the court renders judgment in favor of plaintiffs and against defendant in said amounts and directs plaintiffs to submit an appropriate form of judgment. The foregoing Memorandum

Opinion and Order constitutes the court's Findings of Fact and Conclusions of Law as required by Rule 52(a) of the Federal Rules of Civil Procedure.

Dated: February 25, 1977

Alfonso J. Zirpoli
United States District Judge

FOOTNOTES

1/ Page 3 This Supplemental Agreement is identical to and also known as Joint Council 7 Local Pickup and Delivery Supplemental Agreement.

2/ Page 7 The General Vice-President of the International Brotherhood of Teamsters and Chairman of the negotiating committee.

3/ Page 7 Mr. Fitzsimmons' letter, which is attached to the affidavit of Mr. Beagle filed in these proceedings, states in part:

> There never has been an extension agreement entered into with respect to the 1967-1970 National Master Freight Agreement, since such extension agreement was not necessary. Article 37 of the National Master Freight Agreement for the period from 1967 to 1970 provided the Unions with a right either to terminate or to continue the Agreement and ask for amendments. A decision was made to continue and ask for amendments. The notices which Local 70 was directed to send to its employers, as

> well as notices which were sent by the National Negotiating Committee and the Western Conference of Teamsters on behalf of Local 70 to Local 70's employers all clearly set forth the intention of the Local Union and the National Negotiating Committee to continue the existing Agreement but to negotiate amendments. That Agreement, therefore, was never terminated and, accordingly, no extension agreement was necessary.

As the United States Court of Appeals for the Eighth Circuit has stated:

> The interpretation of the National contract by the National officers is entitled to great respect.

Motor Carriers Council of St. Louis, Inc. v. Local Union No. 600, 486 F.2d 650, 653 (1973).

4/ Page 7 See *Brotherhood of Teamsters and Auto Truck Drivers Local No. 70*, 194 NLRB 674, 678-80; *Motor Carriers Council of St. Louis, Inc. v. Local 600*, 370 F.Supp. 461, 465 (1972), *aff'd*, 486 F.2d 650 (1973); *Dean Truck Line*, Inc. v. Local 667, 327 F.Supp. 1335, 1337 (1971).

5/ Page 12 Article 42, Section 1A provides:

> Any grievance or controversy affecting the mutual relations of the Employer and the Union shall first be taken up between the Local Union and the individual Employer involved.

6/ Page 17 Article 8(a) of the National Freight Agreement provides:

> All grievances or questions of interpretation arising under the provisions of the Supplemental Agreements thereto shall be processed as set forth below. If such Supplemental Agreements provide for arbitration of discharges, such procedure shall be continued.
>
> (1) All factual greivances or questions of interpretation arising under the provisions of the Supplemental Agreement (or factual grievances arising under the National Master Agreement) shall be processed in accordance with the grievance

procedure of such Supplemental Agreement ....

7/ Page 23 This fact is in no way undercut by the decision of the United States Court of Appeals in Mason Dixon Lines, Inc. v. Teamsters Local 560, supra. As this court noted in its order of January 25, 1974, Mason Dixon Lines is clearly distinguished from the instant case since the Area Supplemental Agreement in that case contained an express provision requiring all questions of liability for violations of the agreement to be resolved pursuant to the grievance procedure. In this regard, attention is again invited to Stillpass Transit Co. v. Ohio Conference of Teamsters, supra, wherein the Court of Appeals for the Sixth Circuit held that language similar to that in Article 8(d) was not susceptible to a construction requiring the employer to arbitrate the claim for damages against the union.

8/ Page 24 In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court held that the repudiation of the Contract by either party to a collective bargaining agreement would estop that party from relying on the exhaustion grievance machinery as a defense to the other party's cause of action. The Court stated:

> An obvious situation in which the employee should not be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. Drake Bakeries v. Bakery Workers, 370 U.S. 254, 260-263. See generally 6A Corbin, Contracts § 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

Id. at 185.

9/ Page 25 Supplemental order specifying undisputed facts dated May 8, 1975.

10/ Page 28 See also Boys Markets v. Clerks Union, 398 U.S. 235, 248 (1970), and Gateway Coal Co. v. Mine Workers, 414 U.S. 368 (1974).

11/ Page 33 In its order of May 8, 1975, this court held that the evidence of record made a prima facie showing that "no impasse was reached between employer and union negotiating committees during negotiations for the 1970-1973 National Master Freight Agreement and Supplement thereto." This fact was deemed by the court to be established for all purposes in the action unless rebutted by defendant at trial. Since defendant introduced no significant evidence on this subject, the fact remains established that there was no impasse reached during negotiations.

12/ Page 45 The no-strike clause also contained a provision that the Union was required immediately to order employees to return to work in the event of an unauthorized work stoppage, an obligation which impliedly arises whenever there is a no-strike clause. Eazor Express, Inc. v. Int'l Bhd. of Teamsters, 520 F.2d 951 (3d Cir. 1975).

13/ Page 49 Defendant has apparently taken the position that plaintiffs have failed to prove that the Union leaders caused a sick out. Plaintiffs, of course, do not have any such burden of proof. Plaintiffs have shown that the Union leadership called a strike on April 1 which was fully ratified by the Union membership. Plaintiffs have also established that the work stoppage, which commenced on April 1, 1970, continued without any abatement whatsoever until April 8, 1970. Plaintiffs do not have any burden of proving that the leadership ratified, condoned or authorized the strike activity every single day on which it took place, since they have established that it was the leadership which called the strike. If defendant now wishes to absolve itself of liability for some portion of that strike by taking the position that its leadership attempted to call it off, it necessarily has the burden of proving its defense. This it has failed to do.

14/ Page 50 Evidence of this meeting is derived from the "report for the membership" written by defendant's recording secretary, Dick Durossette. This evidence is contrary to the testimony introduced in court by defendant, that at the April 3, 1970, meeting, President Muniz personally instructed the membership to return to work. In addition, there is room for question as to whether any meeting took place on April 4, 1970. Although it is incumbent upon defendants to prove such a meeting took place, it has not introduced any minutes which would indicate that either a stewards' meeting or a membership meeting took place. The fact that they have not done so raises a fair presumption that no such meeting occurred. Plaintiffs, who requested all minutes of all meetings during that period of time, have never seen such minutes.

15/ Page 54 The court further notes that on April 6 and 7 the Union did not bother to remove the pickets at IML (Reporter's Transcript, Volume 2, page 348); Frank's (Reporter's Transcript, Volume 1, page 202); Consolidated Freightways, where both Mack and Muniz refused to respond to pleas for assistance (Reporter's Transcript, page 43-44); and Crescent, where Business Agent Diaz was actually present during the picketing and threatened to "knock [the company] out of business," (Reporter's Transcript, pages 265-269).

16/ Page 54 The leaders of Joint Council 7 felt that it was necessary to move to have Local 70 return its employees to work. If Local 70 had indeed already instructed its employees to return to work as it alleges, Joint Council 7 would never have adopted such a motion. Clearly, Local 70 only agreed to order its people back to work when the rest of the Council agreed to support a strike to obtain additional monetary items in the event the Chicago locals were able to negotiate such increases.

17/ Page 58 Plaintiffs' Exhibits 580, 581, 585, 586, 588, and 589.

18/ Page 71 In considering a union's motivation for picketing, the courts have long given import to the concession that a company would have to make to abate the union activity. *NLRB v. Union de Empleados, etc.*, 455 F.2d 1248 (1st Cir. 1972); *NLRB v. Denver Building & Const. Trades Council*, 341 U.S. 675, 688 (1951); and *NLRB v. Local 182, IBT*, 314 F.2d 53, 58 (2d Cir. 1963). Thus, this activity on the part of Muniz not only establishes that the union had absolute control of the picketing, it also establishes that [illegible] purpose of the picketing was to force the employers to sign separate agreements with the union.

19/ Page 72 According to defendant, Local 208's dispute was over the reinstatement of drivers, not over the Master Agreement.

20/ Page 93 This terminology is illuminating, since Local 208 members were not concerned about the national master freight negotiations, but rather with the fact that the wildcatters had been discharged for striking over sick leave. Defendant's brief at 29. In addition, it is the same designation given the April strike.

21/ Page 95 Defendant's brief, page. 40.

22/ Page 95 Plaintiffs' Exhibit 579, wherein Local 70 billed Local 208 for $14,958.10 for expenses incurred for the strike. The expenses included monies spent on food, lodging, gasoline for roving pickets and printing of arm bands and picket signs.

23/ Page 96 Defendant argues that Local 70 could not have invited 208 pickets to the area since Ybarralloza testified that the pickets arrived with a few hours' notice. This is contrary to the evidence. The evidence clearly establishes that the pickets first arrived in the area on May 4, 1970, almost a full work week prior to the time that the picketing activity commenced. In addition, it is noteworthy that one business agent mistakenly pulled the Local 70 members off their job approximately 24 hours prior to the time he was supposed to do it. Moreover, several business agents notified employers within their specific jurisdiction that the strike was going to be taking place the following day. Clearly, the picketing activity was well planned and was not a spontaneous arrival of Local 208 personnel.

24/ page 96 In addition to the evidence that establishes that during the month of May members of Local 70 actively participated in picketing the terminals of DiSalvo, CME/CMT, Delta, Haslett, Morris, Yellow, Sterling, Associated Freight, PMT, and Containerfreight, the evidence establishes that Business Agent Mack commenced the work stoppage at IML by pulling the employees off the job and not allowing them to return to work. He did this at a time when there were no pickets whatsoever present. Accordingly, the defense raised by defendant that its members were merely honoring a picket line has no bearing on the strike at IML. The same reasoning is applicable to the situation at Navajo and Lodi where the employees stayed away from work notwithstanding that there were no pickets present at the terminal at the time they commenced their work stoppage. Plaintiffs also properly argue that this evidence strongly supports the inference that all of the plaintiffs were picketed by Local 70 members. Merely because the pickets were "foreign" or unknown to a company's representatives does not establish that those people were members of Local 208. Since Local 70's membership numbers in the thousands, it is fair to infer from the evidence that they were Local 70 members, since many witnesses testified that the Local 70 members who were picketing their particular companies were employees of other companies and since documentary evidence establishes that a large number of Local 70 personnel were reimbursed for strike-related expenses. Plaintiff's Exhibit 605 and the attachments thereto reveal that approximately 40 members of Local 70 were given a gas allowance on May 15, 1970. This fact supports the proposition that a large number of Local 70 people were participating in the picketing activities and that this participation extended to all of the carriers.

25/ Page 98 Defendant's brief at 29.

26/ Page 100 Clearly without merit is the defendant's argument that since plaintiffs did not request injunctive relief against Local 70 in May, plaintiffs "considered the actions of Local 70 to be solely that of its members respecting picket lines." Defendant was well aware that the preliminary injunction which issued on April 7, 1970, was still in full force and effect during the month of May. Accordingly, there was no need whatsoever for plaintiffs to seek another injunction. As the administrative law judge stated in Brotherhood of Teamsters & Auto Drivers Local No. 70, 194 NLRB 674, 680:

> The record shows that following the State Court Preliminary Injunction dated April 7, 1970, many of the CTA motor carriers whose employees were represented by Local 70 found themselves being

picketed by altered Local 70 picket signs to disguise the identity of Local 70 which was under State Court Injunction not to picket or strike.

27/ Page 123 During the course of Mr. McKean's testimony relating to his damage computations, a question was raised as to whether or not the cost of freight bills, an item included in account 4320, is properly classified as a fixed or variable expense. Mr. McKean had classified these freight bills as fixed since carriers rarely inventory their freight bills each month to arrive at the number of freight bills that are used in a particular period, but rather usually elect to amortize the supplies of freight bills over the anticipated period of usage. For example, a carrier in January of a particular year would expend $10,000 for replenishment of his freight bill supply and then would decide how long the supply would normally last and proceed to charge against each month's income and expense statement the figure arrived at. However, in keeping with the conservative view adopted throughout calculations, and in keeping with Mr. McKean's testimony to the effect that no more than 40% of the entire balance of account 4320 is related to freight bills, Mr. McKean recomputed account 4320 to delete the cost of the freight bills. It should be noted that with all of the 4320 accounts considered for all of the days included in the computation of work stoppage in both the months the result is a $2,615 reduction in lost fixed costs for the month of April and a $3,159 reduction for the month of May, for a total of $5,774. The summaries of computation attached hereto as exhibits have been modified to reflect those reductions for those companies whose damages are affected by more than $100 in each of the months of April and May. This accounts for 11 of the carriers and approximately 80% of the $5,774 change that the overall reclassification would cost. As a result of the fact that the reduction on 16 of the carriers had a negligible effect, those changes were not made on the summary pages to the individual computations. None of these changes relates to Granny Goose or Sunshine.

28/ Page 127 At the time the pickets appeared, Associated's Local 208 employees were working in Los Angeles.

APPENDIX D

FILED
NOV 8, 1974

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

GRANNY GOOSE FOODS, INC.)
)
et al.,)
)
Plaintiffs,)
)
v.) No.C-70-1057
) AJZ
BROTHERHOOD OF TEAMSTERS)
& AUTO TRUCK DRIVERS,)
LOCAL 70,)
)
Defendants.)
)

ORDER GRANTING DISMISSAL AS TO INDIVIDUAL DEFENDANTS AND A STAY PENDING ARBITRATION

This matter came up on motions by the individual defendants to dismiss the complaint and by the defendant Teamsters Local 70 for summary judgment. The dispute out of which this case grew originated in early 1970, when Trucking Employers, Inc., a national bargaining representative for plaintiffs, and the Teamsters National Freight Industry Negotiating Committee began negotiations for an agreement to succeed the 1967-70 collective bargaining agreement that was soon to expire. In April, as a new national Master Agreement was being worked out between these two parties, Teamsters Local 70 informed certain employers in the San Francisco Bay Area that it was not bound by the national negotiations and therefore wished to begin independent negotiations with them for a new agreement.[1/] The employers refused to meet with representatives of Local 70, and the local sought to compel negotiations by picketing and other strike activities. On May 18, 1970, the master agreement negotiated on the national level was ratified by the membership, but Local 70 still refused to concede that it was bound by this agreement. In November of that year Local 70 again demanded separate negotiations and recommenced strike activities.

Plaintiffs thereupon initiated this action for violation of the collective bargaining agreement in a California state court, and the California Trucking Association, an employers' group, filed a similar action.[2/] They sought money damages and equitable relief and named as defendants Local 70 and various of its officers and agents. Defendants removed both actions to federal court and they have been consolidated for trial. At approximately the time they filed their complaints, plaintiffs in both actions filed charges with the National Labor Relations Board, claiming that Local 70 had violated sections 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act, 29 U.S.C. §§ 158(b)(1)(B); 158(b)(3). The trial examiner in both instances found that Local 70's activities constituted unfair labor practices as defined in those sections, a decision that was affirmed by the National Labor Relations Board and enforced in the California Trucking Association case by the ninth circuit. Labor Board v. Teamsters' Local 70, 470 F.2d 509 (9th Cir. 1972), cert. denied 414 U.S. 821 (1973). Only after the ninth circuit's adverse decision did Local 70, in March, 1973, agree to sign, recognize, or be bound by the 1970-73 master agreement. By its terms, that agreement was to expire on June 30, 1974.

Subsequently, plaintiffs in the California Trucking Association case moved for partial summary judgment on the issue of whether Local 70 had breached its collective bargaining agreement, arguing that the trial examiner had so decided and that his determination was binding on the court as res judicata. Defendants responded by contending that under the 1967-70 agreement plaintiff employers were required to arbitrate their dispute before going to court. In an order dated January 25, 1974, the court rejected both contentions, concluding that the trial examiner had not determined that Local 70 had breached its agreement and that article 8(d)[3] of the 1967-70 agreement expressly permitted the employer to seek legal redress for a strike in violation of the agreement. Defendants also raised several procedural objections, all of which the court rejected: (1) that the suit should be dismissed for failure to join the International Union because it was a necessary party under Fed. R. Civ. P. 19; (2) that the matter is preempted by the National Labor Relations Act because the actions involved are arguably violations of that Act; (3) that section 301 of the Act, 29 U.S.C. § 185, prohibits an employer association from being a party plaintiff.

The defendants' present motions seek dismissal as to all individual defendants, summary judgment for Local 70 on four bases already rejected by the court in the California Trucking Association case and partial summary judgment as to any claims derived from alleged strike activities after May 18, 1970. The first two motions are easily disposed of.

The individual defendants argue that section 301 of the Act specifically exempts them from liability for money judgments in suits brought against unions for breach of a collective bargaining agreement. See Atkinson v. Sinclair Refining Co., 370 U.S. 238, 245-49 (1962). Since plaintiffs do not oppose dismissal as to the individual defendants, the court will order that they be dismissed.

Local 70's reiteration of the arguments rejected by the court in the California Trucking Association case is apparently to preserve them for appeal. Since it has presented no reason to reconsider the court's earlier decision, the motion for summary judgment will be denied.

The motion for partial summary judgment presents very substantial problems, however. Local 70 argues that since the nonmonetary terms of the 1970-73 master agreement went into effect on May 18, 1970, the employers were bound by that agreement to arbitrate their claims regarding its alleged strike activities before seeking damages in court. Article 8(a) of the argeement requires submission to the greivance process of "[a]ll grievances or questions of interpretations arising under this Master Agreement or Supplemental Agreements thereto." Moreover, in marked contrast to article 8(a)(3)(b) of the 1970-73 agreement requires submission of the question whether a local union participated in a strike in violation of the agreement to the grievance procedure. This important change, it contends, was the result of a bargaining effort (by the International Union, presumably, since it was energetically trying to detach itself from the negotiations and their progeny, the agreement). Thus, Local 70 urges that the bargaining process would be subverted were the court to relieve the employers of the new duty to arbitrate imposed on them as a result of collective bargaining.

Plaintiffs contend in response that by its intransigence in refusing to admit itself bound by the 1970-73 agreement until March, 1973, little more than three months before it would expire, Local 70 waived whatever right it might have had under the agreement to arbitrate. They rely on dictum in Drake Bakeries v. Bakery Workers Local 50, 370 U.S. 254 (1962). The employer there filed suit to recover damages for an alleged breach of the no-strike clause of the agreement. The union, instead of answering, moved for a stay pending arbitration, arguing that the matter was arbitrable. The employer opposed this motion, partly on the theory that the union, when it breaches such an important clause as the no-strike clause, should be held to have waived, or to be estopped from asserting, its contractual right to arbitrate. See Id. at 261. The Court rejected this argument and held that since the union had asserted its desire to arbitrate at the "first occasion," it had proceded promptly and therefore had not waived its right to arbitrate. Id. at 266-67. It therefore held that the district court had properly stayed the action pending arbitration.

In rejecting the employer's waiver argument, however, the Court seemed to adopt the estoppel doctrine. Thus, it noted that "in determining whether one party has so repudiated his promise to arbitrate that the other party is excused the circumstances of the claimed repudiation are critically important." Id. at 262-63. In support of this proposition it cited 6 Corbin, Contracts § 1443 (1961 Supp.) as follows:

> The effect of a repudiation upon the repudiator's right to arbitration should depend on the character of his so-called "repudiation" and the reasons given for it. One who flatly repudiates the provision for arbitration itself should have no right to the stay of a court action brought by the other party.

370 U.S. at 263 n.10. The Court seemed, therefore, to be putting labor arbitration on the same footing as arbitration in other cases[4/] and concluded that the union in Drake Bakeries should be permitted a stay pending arbitration only because it promptly asserted its claim of arbitrability On the basis of Drake Bakeries, several lower courts found that parties to collective bargaining

agreements had waived their right to demand arbitration. See Kennecott Copper Corp. v. Electrical Workers Local 1081, 339 F.2d 343 (10th Cir. 1964); E.T. Simonds Const. Co. v. Hod Carriers Local 1330, 315 F.2d 291 (7th Cir. 1963); Inter-Continental Engine Serv. Inc. v. International Ass'n of Machinists, 305 F.Supp. 577 (S.D. Tex. 1969); cf. Bath Marine Draftsman's Ass'n v. Bath Iron Works Corp., 266 F.Supp. 710, 713 n.5 (D. Maine 1967).

Without arguing that the circumstances here do not support a finding of repudiation, [5] Local 70 contends that the question of repudiation itself is for the arbitrator under Operating Engineers Local 150 v. Flair Builders, Inc., 406 U.S. 487

(1972), which holds that the issue of laches should go to arbitration. The union there had, in 1964, entered into a memorandum agreement with Flair, a small independent contracting firm, incorporating by reference a 1963 master agreement between the union and several contractor associations. In 1966 the union and these associations entered into a new master agreement that required arbitration of "any difference ... between the parties hereto which cannot be settled by their representatives, within 48 hours of the occurrence." In June, 1968, more than four years after the memorandum agreement was signed, a union business agent visited Flair and found that its four employees were nonunion and that the wages they received were, to his mind, not satisfactory. Flair disavowed any obligation under the 1964 agreement. In 1969, the union filed suit to compel arbitration pursuant to the terms of the 1966 master agreement. The district court, after an evidentiary hearing, found that there was an enforceable agreement between Flair and the union between 1964 and 1968 but concluded that the union was barred by laches from asserting its claim to arbitrate the dispute in light of the hardship arbitration would impose on Flair. The Court of Appeals affirmed, concluding that since laches was "extrinsic" to the agreement because it did not involve interpretation of the agreement, it presented a question for the court and was not arbitrable. Operating Engineers Local 150 v. Flair Builders, 440 F.2d 557 (7th Cir. 1971).

The Supreme Court reversed. It held that the only duty of the court is to determine whether the parties have entered into an enforceable agreement to arbitrate and that, "once a court finds that, as here, the parties are subject to an agreement to arbitrate, and that agreement extends to 'any difference' between them, then a claim that particular grievances are barred by laches is an arbitrable question under the agreement." 406 U.S. at 491-92. Mr. Justice Powell dissented because he objected to imposing such a burden on Flair and worried that:

> The effect of the Court's decision also could be far reaching in the law of labor-management relations. It appears that the long-accepted jurisdiction of the courts may now be displaced whenever a collective-bargaining agreement contains a general arbitration clause similar to that here involved. If in such circumstances the affirmative defense of laches can no longer be invoked in the courts, what of other affirmative defenses that go to the enforceability of a contract? Does the Court's opinion vest in arbitrators the historic jurisdiction of the courts to determine fraud or duress in the inception of a contract?

Id. at 497.

This court is faced with the question whether the Flair opinion removes the court's jurisdiction to refuse arbitration on grounds of repudiation. The Supreme Court did not cite Drake Bakeries, supra, in Flair, although the import of the decision seems to have disapproved the repudiation dictum sub sientio. The Court did rely on John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964); that opinion gives some guidance in applying Flair. The employer there had acquired by merger a firm that had previously entered into a collective bargaining agreement with the union. The main dispute involved the employer's responsibilities under the agreement as successor in interest; the union sought to compel arbitration of that issue. The employer resisted on the theory that the union had not followed the procedure set out in the agreement, which required conferences prior to arbitration. Noting "the central role of arbitration in effectuating national labor policy," Id. at 549, the Court held that the effect of the union's failure to comply with the agreement's procedure was a question for the arbitrator. It concluded that labor disputes cannot sensibly be broken down into "substantive" and "procedureal" aspects but are more reasonably treated as a single cluster of problems.

> Doubt whether grievance procedures or some part of them apply to a particular dispute, whether such procedures have been followed or excused, or whether the unexcused failure to follow them avoids the duty to arbitrate cannot ordinarily be answered without consideration of the merits of the dispute which is presented for arbitration. In this case,

> one's view of the Union's responses to Wiley's "procedural" arguments depends to a large extent on how one answers questions bearing on the basic issue, the effect of the merger; e.g., whether or not the merger was a possibility considered by Interscience and the Union during the negotiation of the contract. It would be a curious rule which required that intertwined issues of "substance" and "procedure" growing out of a single dispute and raising the same questions on the same facts had to be carved up between two different forums, one deciding after the other. Neither logic nor considerations of policy compel such a result.

Id. at 557.6/

Claims of repudiation seem similarly to depend on the merits of the underlying labor dispute, and therefore to be arbitrable under Flair. It appears that those lower courts that have faced the issue have so concluded. The court of appeals for this circuit has not decided the issue. In General Dynamics Corp. v. Marine Workers Local 5, 469 F.2d 848 (1st Cir. 1972), the employer argued that the union's initial refusal to arbitrate and later resistance to arbitration operated as a repudiation of the arbitration provision as a matter of law. The union also sought a judicial determination of whether its conduct amounted to repudiation, but the court refused to decide the issue because it felt that Flair compelled arbitration of a claim of repudiation.

> We believe that if the equitable defense of laches, which is a general defense not limited to contract suits nor dependent on the provisions of the contract, can be subject to an

> arbitration provision, then certainly the legal defense of repudiation, which necessarily requires an interpretation of the meaning of the contract and the intent of the parties, can be subject to an arbitration provision, if covered by its terms.

Id. at 853; see also H. & M. Cake Box, Inc. v. Bakery Workers Local 45, 493 F.2d 1226 (1st Cir. 1974); Brick Workers Local 552 v. Hydraulic Press Brick Co., 371 F.Supp. 818 (S.D.Mo.1974); Operating Engineers Local 542 v. Penn State Const., Inc., 356 F.Supp. 512 (M.D.Pa.1973). Given the emphasis the Supreme Court placed on referring to arbitration "procedural" matters that depend upon an analysis of the merits of the underlying dispute, the first circuit's resolution seems unavoidable. In this case the factors upon which the employers rely to establish repudiation--refusal to admit being bound by the master agreement--clearly depend upon the same nucleus of fact that they rely upon to justify the recovery they seek. Under Flair and John Wiley such issues are for the arbitrator.

The only issue for the court in this case, therefore, is to determine whether Local 70's alleged repudiation is an issue consigned to the arbitrator under the 1970-73 collective bargaining agreement. Article 8(a) of the master agreement for 1970-73 calls for submission to the grievance procedure of "[a]ll grievances or questions of interpretations arising under this Master Agreement or Supplemental Agreements thereto." Generally, such provisions are interpreted to include all questions on which the parties disagree unless specifically excluded from arbitration. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1961). Plaintiffs do not contend that the question of repudiation would be excluded in this case, and the court is not aware of limiting language that would support such a contention. The wording of article 8(a) seems to have been written as broadly as possible and not to be susceptible to a circumscribed interpretation. Thus the court concludes that, pursuant to the Supreme Court's opinion in Flair, it is without jurisdiction to determine whether Local 70 has so repudiated the 1970-73 master agreement as no longer to be able to demand that plaintiffs arbitrate their damage claim for conduct alleged to have occurred after May 18, 1970.[7/]

The court is aware that this interpretation of Flair places a substantial burden on it in handling this case, but has concluded that this burden is justified by the policy in favor of arbitration. The principal source of this burden is the posture of the case, which presents more complicated problems than the Supreme Court faced in Flair. For purposes of this motion, Local 70 does not challenge the court's jurisdiction as to all events before May 18, 1970.[8/] Thus, the issues it involves could be decided by two forums, a result the Court disapproved in another context in John Wiley, supra, 376 U.S. at 557.

These problems did not confront the Court in Flair, where the whole dispute was referred to arbitration. Yet, in the context of the bargaining history of these parties, it would seem that the court, in coping with these problems, is serving the basically conciliatory objective of the national labor laws. The reason the May 18 cutoff is important is that the parties to the collective bargaining agreements in 1970 changed the scope of their arbitration provisions on that date. They are now operating under a new 1973-76 master agreement which includes, in its article 8(2)(b), basically the same requirement that arbitration precede an action for damages, and they may be expected to continue their bargaining relation in the future. Where the parties have a long term bargaining relationship with one another, the court feels that Judge Stevens' observation in dissent from the court of appeals decision in Flair is apt:

> The appropriateness of laches as a defense to a labor dispute involves a consideration of several questions which can best be answered by one who is familiar with the collective bargaining relationship between the parties.

440 F.2d at 561. The burden imposed on the court by the bifurcated treatment of what was, it seems, a single

course of conduct, is similarly justified by the interests of industrial peace.

Another problem that concerns the court is that the opinion in Flair takes no note of the point the court proceedings have reached when the arbitration question comes up. Flair itself was a suit to compel arbitration; the question did not, of course, come up. Drake Bakeries indicated that passage of time from the filing of the complaint in court might be the proper measure of whether the party demanding arbitration might be held to have waived that right; the circumstances of this case lead the court to conclude that it would be desirable to establish some rule about how long a party can preserve its right to shunt a matter to arbitration after a court begins to invest its time in the case. In Operating Engineers Local 542 v. Penn State Const., Inc., supra, 356 F.Supp. 512 (M.D.Pa.1973), for example, the defendant employer denied that it was bound by the subject agreement until three days after the pretrial conference and demanded arbitration some two weeks after that. The court interpreted Flair to require that the question of whether the employer had waived or was estopped to assert its right to arbitrate was for the arbitrator. Here, Local 70 has delayed more than three years since the filing of the original complaint and has carried one appeal all the way to the United States Supreme Court. The court has invested a great deal of time in this case and the California Trucking Association case, and is concerned that such dilatory demands for arbitration might become commonplace methods to delay vindication of the rights of those who are victimized by unauthorized use of economic pressure. Moreover, to disregard such delay might permit parties to play fast and easy with the jurisdiction of the courts. What, for example, of a defendant who goes to trial and moves for a stay pending arbitration only after the plaintiff has presented its case and the court has denied the defendant's motion for a directed verdict. True, the arbitrator would have to take into account all of these matters in deciding whether the defendant's delay constituted a waiver of its right to arbitrate, but it seems a perilous course for the courts to commit the integrity of their jurisdiction to arbitration. Additionally, if the arbitrator does determine that waiver had occurred, the defendant in the above example has still very substantially disrupted the orderly proceedings of the court and delayed proper resolution of the case. The court feels that it should have at its disposal some device to minimize the disruptive potential of a demand for arbitration late in the judicial proceedings. Since no such rule seems presently to exist, the court could not refuse Local 70's demand for arbitration, but it does note that the delay in this case is not likely to disrupt the proceedings to the degree that would, in the court's opinion, justify denial of arbitration on that ground alone.

Plaintiffs also urge that arbitration should be refused because it would be a "futile act" after the ruling of the National Labor Relations Board on their unfair labor practices claim which, they argue, decided all matters that might come before the arbitrator.[9/] See Teamsters Local 70 and Granny Goose Foods, 195 N.L.R.B. 454 (1972). Thus, even if there has been no waiver there is, in their view, nothing left to arbitrate. They rely on Carey v. Westinghouse Electric Corp., 375 U.S. 272 (1964), for the proposition that the arbitrator may not make a factual determination in conflict with that of the Board and conclude the Board has already decided that Local 70 has violated the 1970-73 master agreement and that there is nothing left for the arbitrator to do. Whatever the merit of their contentions about the effect of the Board's decision, the court concludes that it has not foreclosed all matters that can be arbitrated. The proper jurisdictional relationship between the arbitrator and the Board is a difficult question that need not be confronted now; the cases upon which plaintiffs rely are attempts to delineate that relationship in other contexts.[10/] There can be no doubt that the Board's decision does not foreclose arbitral consideration of the issue of damages. Since that is a proper subject for arbitration, Teamsters Local 70 v. Consolidate Freightways Corp., 335 F.2d 642 (9th Cir. 1964), and since the master agreement does not appear to exclude it from the grievance machinery,[11/] there is at least one question that remains open for arbitration. Presumably the arbitrator will not overstep the proper bounds of his jurisdiction or inquire into matters already foreclosed by the Board's decision; the court may, in the future review any award for jurisdictional excesses. At this moment, however, the court's only duty is to turn the matter over for arbitration.

Having concluded that arbitration is required as to events after May 18, 1970, the court must determine what disposition is presently appropriate for those matters and for the matters that presently remain before the court. In approaching this question, the court feels that it can consider the impact of Local 70's delay in demanding arbitration. See Technical Workers Local 757 v. Budd Co., 345 F.Supp. 42 (E.D.Pa.1972) (holding that, even after Flair, a court may consider laches in deciding whether to issue a preliminary injunction). Thus, the court hopes, insofar as is possible, to shape its response with an eye to protecting the interests of the plaintiffs in this action and the California Trucking Association case.

In Drake Bakeries, the Supreme Court upheld the trial court's stay pending arbitration. In General Dynamics Corp. v. Marine Workers Local 5, supra, 469 F.2d 848 (1st Cir. 1972), by contrast, the court upheld the trial court's dismissal of the case despite plaintiff's request for a stay because it concluded that arbitration might well produce a final settlement of the problem. See Id. at 854. Here Local 70 has requested a summary judgment. While the court may have the power to grant the motion, it feels that it should retain jurisdiction over the action. It seems unlikely that arbitration will finally resolve the damage question that now confronts the court, and it is certain that the court cannot, for the present, avoid further involvement in this controversy as to conduct before May 18. Thus some sort of stay seems to be the most appropriate resolution of the problem. Given the peculiar posture of this case and the California Trucking Association case, a stay of the proceedings now before the court seems impractical unless the parties plaintiff in both actions desire a stay pending resolution by the arbitrator of the repudiation issue. The court therefore will stay any further proceedings in this case with reference to damage claims for events after May 18, 1970, and will consider an application by plaintiffs for a stay pending arbitration of the question of repudiation by Local 70. The court notes that, if it were to grant such a stay and the arbitrator were to find that Local 70 had waived its right to arbitrate, the court would regain jurisdiction over the entire course of conduct alleged by plaintiffs to have caused them damage.

IT IS THEREFORE ORDERED that the complaint is dismissed as to all individual defendants.

IT IS FURTHER ORDERED that proceedings in this case are stayed as to all claims arising from alleged conduct of or on behalf of defendant Teamsters Local 70 that occurred on or after May 18, 1970.

Dated: November 8, 1974

Alfonso J Zirpoli
United States District Judge

FOOTNOTES

[1] Page 2 It appears that, for the first time since use of the national bargaining device was inaugurated, the International Brotherhood of Teamsters decided in 1969 not to solicit powers of attorney from local unions prior to entering into negotiations on their behalf; there could therefore be some uncertainty about whether various locals were in fact bound, although it does not appear that this change in procedure materially affected the development of the controversy.

[2] Page 3 The other action, which is discussed *infra* in the text, is *California Trucking Ass'n v. Teamsters Local 70*, N. C 70-883 AJZ.

[3] Page 6 Article 8(d) of the 1967-70 master agreement provided that "[n]othing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement." By contrast, article 8(a)(3)(b) of the 1970-73 master agreement provides that:

> The question of whether the International Union, an Area Conference, or a Local Union, separately or jointly, participated in an unauthorized work stoppage, slowdown, walkout or cessation of work in violation of this Agreement by calling, encouraging, assisting or aiding in such stoppage ... shall be submitted to the grievance procesure at the national level, prior to the institution of any damage suit action.

Thus, it appears that there was a very significant change in the method of handling allegedly unauthorized strikes under the new master agreement negotiated in 1970.

4/ Page 13 In Vaca v. Sipes, 386 U.S. 171 (1967), the Court again lumped labor contract grievance procedures together with other such procedures in analyzing the circumstances under which an employer sued by an employee could defend on the theory that the employee had not exhausted the contractual grievance process:

> An obvious situation in which the employee should not

> be limited to the exclusive remedial procedures established by the contract occurs when the conduct of the employer amounts to a repudiation of those contractual procedures. Cf. *Drake Bakeries v. Bakery Workers*, 370 U.S. 254, 260-263. See generally 6A Corbin, Contracts § 1443 (1962). In such a situation (and there may of course be others), the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's cause of action.

Id. at 185. The court notes this additional repudiation doctrine because it feels that different policies may affect the disposition of repudiation claims based on *Vaca v. Sipes* from those involved in this case, and wishes to make clear that its holding is not intended to imply that it feels that the opinion in *Flair*, disucssed *infra* in the text, operates as a limitation on *Vaca v. Sipes*.

5/ Page 14 It would seem, indeed, that they argue very strongly for such a finding. The union resisted the contract in this case for almost three years and, during all that time, repudiated all its provisions, including the arbitration clause. Even after it submitted to the agreement under the stimulus of the ninth circuit's enforcement of the Board order in the California Trucking Association case, it delayed more than another year before raising the issue of plaintiffs' duty to arbitrate under the 1970-73 agreement, which had by that time expired. This conduct, combined with the confusion caused by detaching part of this case and sending it to the arbitration (discussed infra in text), seem more persuasively to justify a finding of waiver than the facts in some of the cases cited above.

6/ Page 21 It would seem that this effort to keep the court out of questions that involve the merits of the labor dispute inherently cuts against the proposition in Drake Bakeries that the court should look to "the circumstances of the claimed repudiation," 370 U.S. at 262-63, but the Court did not consider this question in Wiley.

7/ Page 26 In so concluding, the court does not suggest any solution to the questions posed by Mr. Justice Powell in dissent in *Flair*, but it would note that issues such as fraud and duress seem likely to delve into the merits of the labor dispute.

8/ Page 27 In another motion, also decided today, Local 70 also contends that all damage claims arising after April 1, 1970, are arbitrable. The court has rejected this April 1st date for reasons set out in the order issued today in the *California Trucking Association* case.

9/ Page 33 Plaintiffs in the *California Trucking Association* case raised similar contentions to support a motion for summary judgment on the issue of violation of the 1967-70 master agreement on the basis of the decision of the Board in that case. See *Teamsters Local 70 and California Trucking Association*, 194 N.L.R.B. 674 (1971). The court denied the motion, concluding, after an analysis of the Board's opinion, that the Board did not specifically decide that the union was bound by or had violated the contract and that the essential finding did not relate to the effect of the contract, but to the union's attempted withdrawal from the bargaining unit, which amounted to an unfair labor practice prohibited by the Act. Since the court here concludes that there is at least one issue for the arbitrator, it does not need to make a similarly detailed analysis of the import of the Board's decision. It is worth noting, however, that the Board was in both cases dealing with violations of the Act rather than attempting to enforce the contract.

10/ Page 35 The thorny problem of the relationship between the Board and the arbitrator comes up in cases where the complained of conduct is not only allegedly in violation of the contract but also arguably unfair labor practice in violation of the Act. The Supreme Court has struggled with the question of how to allocate authority to evaluate questionable practices in industrial relations on several occasions. See Note, Contractual Interpretation, Unfair Labor Practices and Arbitration: A Proposed Resolution of Jurisdictional Overlap, 68 Mich. L. Rev. 141 (1969). In Carey v. Westinghouse Electric Corp., supra, 375 U.S. 261, the employer resisited arbitration on the ground that the issue involved was a representation matter and therefore solely within the jurisdiction of the Board. In rejecting this contention, the Court noted that the wrongdoers could not be insulated against the effects of its violation of the Act by a favorable decision from the arbitrator.

> Should the Board disagree with the arbiter, by ruling, for example, that the employees involved in the controversy are members of one bargaining unit or another, the Board's ruling would, of course, take precedence ....

Id. at 272. Plaintiffs quote an abbreviated version of the above language to support the conclusion that, as an interpretation of the collective bargaining agreement, a Board determination of fact is binding on the arbitrator. But it may be that that power exists only to protect policies of the Act; not as to all conclusions regarding the provisions and effect of a collective bargaining agreement. Certainly one would not expect the normal presumption in favor of arbitral resolution of industrial conflict to give way so easily before a Board decision to adopt the trial examiner's findings. The Board's policy of restricted review supports the conclusion that its fact finding should not operate to constrict the arbitration process. As Mr. Justice White noted in dissent in Motor Coach Employees v. Lockridge, 403 U.S. 274 (1971):

> not only does Board policy allow arbitrators to pass on conduct which is also an alleged unfair labor practice, but the Board will not consider an unfair labor practice charge unless the arbitrator has passed on it. And even then, the Board has made quite clear that its standard of review is far from de novo; it will let stand an arbitrator's award not "clearly repugnant" to the Act.

Id. at 311 (footnote omitted). If the arbitrator has such wide discretion before the Board has acted, he may have a similarly broad discretion to disagree with its interpretation of the terms of the collective bargaining agreement. Before the court could confront this question, however, it would need further analysis of these issues from the parties.

11/ Page 35 The parties have not, in their briefs, discussed the question of whether the arbitrator may award damages or determine the amount thereof under their master agreement; Local 70, in its motion, speaks of "damage claims," implying that he could. The court has found nothing in the agreement that precludes such a disposition by the arbitrator.

APPENDIX E

FILED
NOV. 8, 1974

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

CALIFORNIA TRUCKING ASSOCIATION,
Plaintiff,

v.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL 70,
Defendent.

No. C-70-883-AJZ

ORDER GRANTING STAY PENDING ARBITRATION

The court here confronts a motion by defendant Teamsters Local 70 very similar to that decided today in Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers Local No. 70, No. C-70-1057 AJZ. Both cases arose out of strike and other activity during 1970 allegedly in violation of collective bargaining agreements. The description of the facts contained in the order issued today in the Granny Goose case adequately describes the developments that precipitated this motion, and is incorporated by reference herein. Additionally, the legal analysis that led the court to conclude that it had to stay its proceedings as to damage claims based on conduct after May 18, 1970, pending arbitration of such claims is also applicable to this motion. The differences between the motion presently before the court and that decided today in the Granny Goose case are that this motion seeks summary judgment in the California

Trucking Association case and that it seeks a summary judgment in both cases as to all claims derived from conduct after April 1, 1970. The court concludes that it should stay the proceedings in the California Trucking Association case on damage claims based upon conduct after May 18, 1970.

Defendant Local 70 contends that the 1970-73 master agreement became effective on April 1, 1970, the day the 1967-70 agreement had expired, and that therefore all claims arising after that time were governed by it. But, as the court held in its order of January 25, 1974, Article 37 of the 1967-70 agreement extended it beyond its termination date unless notice of a desire to cancel was filed by a party wishing to cancel. See Order at p. 7. Thus, the earlier master agreement continued in effect until superseded by the 1970-73 master agreement. When the new agreement was ratified by the membership on May 18, 1970, its monetary provisions were made effective as of April 1. But its nonmonetary provisions, such as the duty to arbitrate, were not applied retroactively. As the court held on January 25, 1974, plaintiffs were entitled, under article 8(d) of the 1967-70 agreement, to sue for damages without first having exhausted the grievance procedure. Therefore, Local 70 has no right to demand arbitration of damage claims arising from conduct up to May 18, 1970.

In opposing Local 70's effort to compel them to arbitrate their post-May 18 damage claims, plaintiff relies, as did plaintiffs in the Granny Goose case, on the doctrine of repudiation. The court rejects that argument here for the reasons set out in the order issued this day in the Granny Goose case.

Plaintiff also argues that, even if arbitration is appropriate in the Granny Goose case, it should not be ordered in this case because it is only seeking to recover for violation of the 1967-70 agreement. The court has some difficulty in determining what plaintiff is getting at with this argument. In its amended complaint, filed December 12, 1973, plaintiff alleges, in paragraph X, that the complained-of strike activity began on or about April 1, 1970, and "continued thereafter and at various times up to and beyond the time employee ratification of proposed changes and amendments to the Agreements was announced." Thus, the court cannot conclude that plaintiff does not seek to recover damages for conduct after May 18, 1970, and rejects plaintiff's contention that it should be treated differently in this respect from plaintiffs in the Granny Goose case. While plaintiff might argue additionally that Local 70's alleged conduct constituted a single course of conduct and therefore should be presented only to one tribunal, the court feels that the parties to the master agreement themselves, in changing it to require arbitration of damage claims governed by the 1970-73 agreement, compelled this result.

Local 70 has sought summary judgment in this case, as it did in the Granny Goose case. For the reasons set out in the order in that case, the court prefers to stay its proceedings pending arbitration; it will entertain a motion by plaintiffs to stay all proceedings pending resolution of the issue of repudiation through the grievance process. If plaintiffs wish to proceed with the claims now before the court, the court will proceed.

IT IS THEREFORE ORDERED that all proceedings before this court relating to damage claims based on conduct of defendant Teamsters Local 70 after May 18, 1970, are stayed pending arbitration.

Dated: November 8, 1974

Alfonso J. Zirpoli
United States District Judge

APPENDIX F

FILED
JAN 25, 1978

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

CALIFORNIA TRUCKING ASSOCIATION,
Plaintiff,

v.

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS, LOCAL 70,
Defendents.

No. 77-3445

D.C. Nos.
C-70-883-AJZ

ORDER

In April, 1970, defendant Brotherhood of Teamsters & Auto Truck Drivers, Local 70, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, and the individual defendant officers and members of Local 70 picketed and caused employees of certain of plaintiff's members to stop work.

Plaintiff association represents some 210 trucking companies in their labor negotiations. At the time, plaintiff alleges, Local 70 was bound by the 1967-1970 collective bargaining agreements entitled, "National Master Freight Agreement," and "Western States Over-the-Road Motor Freight Agreement." Article 37 of the Master Agreement, which also controls the other agreements, provided for negotiation of changes and revisions in the agreement and prohibited economic recourse except where the parties otherwise failed to agree.[1/] The Master and Supplemental Agreements contained provisions prohibiting strikes until all other grievance procedures were exhausted.[2/]

As a result of defendants' activities, plaintiff filed this action in state court alleging a violation of the collective bargaining agreement. Defendants removed the action to federal court, basing jurisdiction on section 301(a) of the National Labor Relations Act, as amended 29 U.S.C. § 185(a).[3/]

At approximately the same time, plaintiff filed charges with the National Labor Relations Board, claiming defendants' activities violated sections 8(b)(1)(B) and 8(b)(3) of the National Labor Relations Act, U.S.C. §§ 158(b)(1)(B) and 158(b)(3). The trial examiner found Local 70's activities constituted unfair labor practices as defined in those sections. 1972 CCH NLRB Dec. ¶ 23,733. The Board's Decision and Order is reported at 194 NLRB No. 106. His decision was affirmed by the National Labor Relations Board in Washington, D.C. and was enforced by the ninth circuit. NLRB v. Teamsters Local 70, 470 F.2d 509 (9th Cir. 1972). Defendants' petition for a writ of certiorari was denied by the Supreme Court, 42 USLW 1394 (October 9, 1973).

Plaintiff moves for summary judgment on the issue of whether defendant Local 70 breached its collective bargaining agreement with plaintiff. It is plaintiff's position that this issue was fully litigated and determined in the proceedings before the Board and is therefore binding on this court by virtue of the doctrine of res judicata.[4/]

In order for the court to grant plaintiff's motion, the dual issues of whether a valid contract or bargaining agreement existed between the parties and whether Local 70 breached that agreement must have been raised, litigated, and determined before the Board.[5/] These issues must also have been necessary and essential to the Board's decision. 1B Moore's Federal Practice ¶ 0.443[1] (1972). Neither party contends that the Board's decision is not final or that there was an inadequate adversary proceeding before the Board.

Defendant first contends that it would be improper for the court to give res judicata effect to the Board's decisions involving unfair labor practices in an action based on breach of a collective bargaining agreement. The court agrees that actions brought under section 301(a) of the National Labor Relations Act are distinguishable from those under section 303 [29 U.S.C. § 187], where the doctrine of res judicata has been applied to decisions of the Board involving charges of unfair labor practices. See Paramount Transport Systems v. Teamsters Local 150, 436 F.2d 1064 (9th Cir. 1971). They are distinguishable because section 303 permits actions to recover damages for a specific unfair labor practice--secondary boycott activity. If the Board determines a violation of section 8(b)(4) [29 U.S.C. § 158(b)(4)] prohibiting such activity took place, an injured party can recover any damages suffered as a result of that violation in federal court. Section 301(a) on the other hand, is not keyed directly to any particular finding of an unfair labor practice. However, this does not mean that no res judicata effect is ever possible in 301(a) actions; it simply means that the Board's findings of unfair labor practices do not necessarily mean res judicata will apply to those findings. In each instance, the district court must examine the

Board's decision to determine if a finding of the existence and breach of a collective bargaining agreement was actually determined in the proceeding, and whether the Board's decision was dependent upon the determination made. Where these elements are present, the doctrine of res judicata is properly invoked. See United States v. Utah Construction & Mining Co., 384 U.S. 394, 421-22 (1966).

The San Francisco trial examiner's decision does contain in the body of the decision under the general heading "Findings of Fact" and the subheading "C. The 1970 Negotiations" the following language relied upon by plaintiff:

> Although the 1967 to 1970 contract, which contained a

> no-strike clause, had not been terminated, and had been opened only for negotiations of modifications, and despite the absence of an impasse in negotiations, Respondent Local 70 began strike and picketing activity against CTA members in Alameda County on April 1, 1970. This strike activity, picketing and resulting work stoppages affected practically all CTA members in Alameda County whose Teamster employees were represented by Respondent Local 70. Local 70 picketing continued at most carrier terminals during the first 3 days of April 1970.

Page 9, line 50 to page 10, line 7.

The court is not willing to conclude on the basis of this slender and casual reference that there was a finding necessary and essential to the Examiner's decision that the 1967-1970 agreements were in force and contained a clear and unequivocal no-strike clause during the period of Local 70's picketing and work stoppages.

The only essential finding here is that Local 70 engaged in strike and picketing activity the first three days of April 1970. The significance of this finding is reflected in the dual reference to it in the trial examiner's conclusions of law (page 28) and its application to both the 8(b)(3) and 8(b)(1)(B) violations. Accordingly, the passing reference to the no-strike clause at 9-10 was merely to emphasize the union's picketing and strike activity, and was not meant to be a determination of the contractual issues.

All that can be determined with any certainty is that the examiner found Local 70 was part of the national bargaining unit which was negotiating the new contracts and was bound by the national negotiations. Although Local 70's bargaining status was no doubt attributable at least in part to the 1967-1970 agreement, the examiner's decision was not premised on Local 70's violation of that agreement. Instead, the examiner found that by taking economic action to be excluded from the multi-union-multi-employer bargaining unit after negotiations by legitimate representatives properly bound Local 70 to the new national agreements, Local 70 violated sections 8(b)(1)(B) and 8(b)(3).

Even this finding is undercut by the ninth circuit's enforcement order which states:

> The offenses charged do not turn upon the existence or nonexistence of a new national agreement, whether signed or unsigned, executed or executory, but rather upon the attempted withdrawal from the unit under the circumstances described and the concomitant restraint and coercion practiced.

470 F.2d at 510 (citations omitted). As emphasized by the enforcement order, it was this bad faith withdrawal attempt and the use of economic coercion that formed the basis for the unfair labor practice charges. Neither the existence of new national agreements nor any binding effect of the past agreements was essential to this finding. See NLRB v. Hart, 453

F.2d 215 (9th Cir. 1971), NLRB v. Jeffries Banknote Co., 281 F.2d 893 (9th Cir. 1960).

Therefore, in conclusion, neither the decision of the Board, nor the ninth circuit enforcement order specifically finds that Local 70 had a valid agreement with plaintiff herein, or that its activities after April 2, 1970, breached the 1967-1970 agreements. Neither was such a finding necessary to determine that the Local committed unfair labor practices. Thus it would be improper for the court to give res judicata effect to the Board's decision on the contract issues in this action. Stebbins v. Keystone Insurance Co., 481 F.2d 501 506-07 (D.C. Cir. 1973).

Turning next to defendants' motions, they most vigorously press the contention that this action is based on the 1970-1973 collective bargaining agreements rather than the three agreements in effect from 1967-1970. This contention is made despite plaintiff's insistence that the 1967-1970 agreements are the basis of its action and the inclusion of those agreements in the complaint by reference, and despite defendants' answer alleging "that the collective bargaining agreements upon which the complaint is based had expired as of March 31, 1970," and their consistent reference to those agreements in their memoranda until July, 1973.

Article 37 of the Master Agreement provides:

> This agreement shall be in full force and effect from April 1, 1967, to and including March 31, 1970, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

No written notice to cancel or terminate was given by defendants or the International Brotherhood of Teamsters. Thus the agreement did not automatically expire on March 31, 1970, but continued in effect, since the 1970-1973 amendments were not ratified by the union membership until May 18, 1970, and all new negotiations were not completed until August 10, 1970. See Board's Decision and Order reported at 194 N.L.R.B. No. 106. Therefore, the 1967-1970 agreements, not the 1970-1973 agreements, govern the period of defendants' alleged strike activity. Furthermore, defendant steadfastly refused to sign, recognize, or be bound by the new agreements until November 21, 1973, after their application for writ of certiorari was denied by the Supreme Court and the ninth circuit enforcement order became final.

Since the 1967-1970 agreements govern this action, defendants' contention that plaintiff has failed to exhaust its contractual remedies must be based on the grievance procedures and other provisions of those agreements.

Plaintiff argues that by striking in April, 1970, defendants violated both the Master Agreement Article 37, prohibiting strikes prior to an impasse in negotiations on revisions of the agreement, and the Supplemental Agreement Article 61, which provides that, "the term of this Supplemental Agreement is subject to and controlled by all of the provisions of Article 37 of the National Master Agreement between the parties hereto."

Additionally, both agreements contained grievance procedures to resolve all disputes under the contract. Therefore, defendant's activities arguably violated both Article 8 of the Master Agreement and Article 42 of the Supplemental Agreement prohibiting economic recourse unless the grievance committee becomes deadlocked.

These same grievance procedures are relied upon by defendants who argue that plaintiff's dispute, involving as it does matters of contract interpretation, should first be submitted to the grievance committee before any judicial action is possible. Given the lack of an unqeuivocal no-strike provision, this position would ordinarily have considerable merit. However, in Article 8(d) the Master Agreement also contains the provision:

> Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.

This provision is equally applicable to the Supplemental Agreement through Section 2 of Article 2 of the Master Agreement which provides, "All such Supplemental Agreements are subject to and controlled by the terms of this Master Agreement ...."

Accordingly, plaintiff argues that Section 8(d) permits it to institute a court action based on defendants' alleged breach of the agreements without initial resort to the grievance procedures. Defendants cite Mason Dixon Lines, Inc., v. Teamsters Local 560, 443 F.2d 807 (3d Cir. 1971), in support of their position that Section 8(d) has no effect on the employer's duty to arbitrate. In Mason Dixon Lines, which considered the same Master Agreement, the New Jersey-New York Area Supplemental Agreement contained the express provision that:

> Where a strike is in violation of this Agreement, or any law including but not limited to violations of Sections 301 or 303 of the National Labor Relations Act, all issues of liability shall be resolved pursuant to the grievance procedure.

In contrast, the Supplemental Agreement here has no explicit provision limiting or abrogating Section 8(d), and thus there is no contractual bar to plaintiff proceeding in this action without pursuing whatever remedies it may have in the grievance procedure.

Since the employer association's right to bring a legal damage action without resorting to the grievance procedures is explicitly stated in the agreements, it overcomes the usual presumption in favor of arbitration. See United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960). See also Drake Bakeries, Inc. v. Bakery Workers, 370 U.S. 254 (1962); Atkinson v. Sinclair Refining Co., 370 U.S. 238 (1962); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

A virtually identical contractual provision was considered in Stillpass Transit Co. v. Ohio Conference of Teamsters, 382 F.2d 940 (6th Cir. 1967), cert. denied, 390 U.S. 1015 (1968), where suit was brought for breach of a no-strike clause contained within the grievance procedures of a collective bargaining agreement. The court of appeals held that the language in the agreement was not susceptible to a construction requiring the employer to arbitrate the claim for damages against the union, and on that basis denied the union's motion to stay or dismiss the proceedings pending arbitration. There is no relevant distinction between Stillpass and the instant action, and accordingly, defendants' motion for summary judgment must be denied. Plaintiff is under no duty to arbitrate its claims before proceeding further in this court.

Defendants additionally raise a series of procedural objections to the court's jurisdiction of this action. They first contend that the International Union which negotiated the Master Agreement must be added as a necessary party. Joinder of parties needed for a just adjudication is governed by Rule 19 of the Federal Rules of Civil Procedure which provides:

> (a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject

> to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Despite the indication in the one case cited by defendants that the International Union is actually a party to the Master Agreement [Eazor Express Inc. v. International Brotherhood of Teamsters, 82 LRRM 3025 (W.D.Pa.1973) (the International Union's position was that it was not a party to the agreement)] all three agreements indicate they are negotiated for and bind only the specific local union signatory and designated employer. See Master Agreement Article I, Section 2. Following the signature lines in the combined Master Agreement and Local 70 Supplemental Agreement is the following language:

> This agreement is approved as to form only by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, and in doing so the International Union assumes no liability whatsoever under this agreement for the performance thereof or otherwise, and by such approval does not become a party to the agreement.

This statement is followed by the printed "signature" of the International Union's General President. Defendants have failed to indicate any concrete way in which the International Union is bound by these agreements.

Since this action was brought by the California Trucking Association against Local 70 and several of its officers alleging a breach of the agreements by Local 70 only for actions which the International Union neither supported nor condoned, and since liability is claimed only against Local 70, complete relief between the parties does not require joinder of the International Union under Rule 19(a)(1).

Neither is joinder required under Rule 19(a)(2). There is no claim of interest by the International Union in the subject of this action and certainly no interest the protection of which as a practical matter would be impaired or impeded without its joinder. Whatever the situation was in April, 1970, the agreements negotiated by the International Union at issue here have long since been superseded by new agreements whose terms have also expired. Thus any interest asserted on behalf of the International Union must be considered highly speculative at this time.

Furthermore, the court finds that whatever interest the International Union could have which defendants claim make it a necessary party has been waived by the presentation of this contention some three years after initiation of the action. Adding an additional party at this time would only further complicate and encumber an already complicated legal action and delay its ultimate conclusion.

The individual defendants seek summary judgment in their favor on the ground that 29 U.S.C. § 185(b) specifically exempts individual union members from money judgments in suits brought against unions for breach of a collective bargaining agreement. See Atkinson v. Sinclair Refining Co., 370 U.S. 238, 247-49 (1962). Plaintiff has since agreed to dismiss the complaint against the individual defendants without prejudice.

Defendant Local 70 next argues that since the activities of Local 70 that form the basis for this action are also arguably violations of the Labor Management Relations Act, this court is preempted by the Act and may not exercise jurisdiction. This contention has been explicitly and continuously rejected by the Supreme Court. See, e.g., Smith v. Evening News Ass'n, 371 U.S. 195, 197 (1962);

Teamsters v. Lucas Flour Co., 369 U.S. 95, 101 (1962); Charles Dowd Box Co. v. Courtney, 368 U.S. 502, 508 (1962).

Finally, defendants argue that section 301 of the Labor Management Relations Act does not permit suit by an employer association. They argue that since section 301 (29 U.S.C. § 185) specifically provides for jurisdiction over labor organizations in subsection (c), but makes no similar provision for employer associations, Congress did not intend to give these entities the right to sue or be sued under section 301(a). Plaintiff, California Trucking Association, is a nonprofit corporation which exists for the purpose of representing its employer members.

This claim is not supported by the weight of authority, and ignores 29 U.S.C. § 152 which defines "employer" as used in the Labor Management Relations Act: "(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly ...." See Employing Plasterer's Ass'n v. Operative Plasterers & Cement Masons International Ass'n, 172 F.Supp. 337 (N.D. Ill. 1959). Defendants concede that the Association is an agent of its employer members.

Plaintiff Association is also a proper plaintiff under Rule 17 of the Federal Rules of Civil Procedure as a real party in interest:

> An executor, administrator, guardian, bailee, trustee of an

> express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought ....

In view of the court's conclusion that the Association is an "employer" under the provisions of 29 U.S.C. § 152 for the purposes of section 301(a), it is a party authorized by statute to sue in its own name. Moreover, the Association is "a party with whom or in whose name a contract has been made for the benefit of another." This definition coincides with the role that the Association plays in negotiating contracts with the union for the benefit of its members. The California Trucking Association is a party to the collective bargaining agreements with Local 70, but the agreements are entered into for the benefit of the member employers. Master Agreement, Article I, Section 1. Thus the Association may bring suit as the real party in interest regardless of its capacity to sue or be sued under Rule 17(b). C. Wright & A. Miller, Federal Practice and Procedure § 1552 (1971).

In accordance with the views expressed in the foregoing memorandum opinion,

IT IS HEREBY ORDERED that plaintiff's motion for summary judgment on liability is denied. IT IS FURTHER ORDERED that the individual defendants are dismissed without prejudice at plaintiff's request. Defendants' motions are in all other respects denied.

Dated: January 25, 1974.

Alfonso J Zirpoli

United States District Judge

FOOTNOTES

1/ Page 2 Article 37 provides in relevant part:

Duration
Section 1. This Agreement shall be in full force and effect from April 1, 1967, to and including March 31, 1970, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

Section 2. Where no such cancellation or termination notice is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions in this Agreement, either party may serve upon the other a notice at least sixty (60) days prior to March 31, 1970, or March 31st of any subsequent contract year, advising that such party desires to revise or change terms or conditions of such Agreement.

Section 3. Revisions agreed upon or ordered shall be effective as of April 1, 1970, or

April 1st of any subsequent contract year. The respective parties shall be permitted all legal or economic recourse to support their requests for revisions if the parties fail to agree thereon.

2/ Page 2 Master Agreement, Article 8(a)(2) & 8(d); Supplemental Agreement, Article 42, Section 4.

3/ Page 3 29 U.S. C. § 185(a) provides:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

4/ Page 5 During oral argument on the motions before this court January 4, 1974, plaintiff's counsel appeared to argue that summary judgment would also be proper based upon the record in this action as a whole. Whatever the merits of this position, it is not properly before the court at this time.

5/ Page 5 In order to find a breach of the agreement, the court must find in turn: (1) that the agreement contained a no-strike clause; (2) that negotiations to modify the agreement had not reached an impasse; and (3) that Local 70 engaged in picketing and other strike activities during the period in question.

APPENDIX G

FILED
MAY 8, 1975

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF CALIFORNIA

CALIFORNIA TRUCKING)
ASSOCIATION, et al.)
Plaintiff,)
v.) No.
) C-70-883-AJZ
BROTHERHOOD OF TEAMSTERS)
& AUTO TRUCK DRIVERS,)
LOCAL 70,)
Defendent.)

ORDER DENYING DEFANDANT'S MOTION
FOR SUMMARY JUDGMENT

Defendant has moved for summary judgment on the ground that plaintiff must exhaust the grievance procedure set up in the 1970-73 Master Agreement before suing for damages. The court has previously confronted motions by defendant to compel plaintiffs to exhaust this grievance procedure. On

January 25, 1974, it held that arbitration was not required by the 1967-70 Master Agreement because Article 8(d) of that Agreement specifically permitted suits where strikes were involved. On March 22, 1974, the court refused to certify this issue for immediate appeal under 28 U.S.C. section 1292(b) because it concluded that there was no substantial ground for difference of opinion on the correctness of its order. Defendant now seeks essentially to reverse that ruling, relying on the presumption of arbitrability and claiming that damage claims arguably not within the exception to the grievance exhaustion requirement contained in Article 8(d) and that the question of whether they are within that exception should be arbitrated. Defendant straddles the issue of whether the court must order arbitration and reasons that since the jurisdiction of the court is "uncertain," it should be safe and order arbitration. But before the court can order plaintiffs to arbitrate, it must determine that they agreed to arbitrate the damages issue. It has already decided that issue adversely to defendant on the 1967-70 Master Agreement and the records of grievances actually processed through the machinery during the period April 1, 1970, to May 18, 1970, upon which defendant relies, do not persuade the court that its prior ruling was incorrect. They are consistent with the court's earlier view that only monetary terms of the 1970-73 Master Agreement were applied retroactively. The court will therefore stand by its prior ruling.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment referring the damage issues presently before the court to the grievance machinery is denied.

Dated: May 8, 1975

Alfonso J. Zirpoli

United States District Judge

APPENDIX H

SEP 8, 1977

Mr. Chuck Mack, Secy-Treas.
Teamsters Local Union 70
70 Hegenberger Road
Oakland, CA 94621

Mr. C. Gordon Dickenson
Ringsby-United
P. O. Box 7240
Denver, Colorado 80207

N-9-77-W5 Local 70 (Oakland) vs. Ringsby Truck Lines Referred JWAC, August, 1977. Interpretation Article 39, Section 3. (Related to Case No. N-3-77-W1, concerning which the NGC retained jurisdiction by postponement pending the return of the case and a record which would permit interpretation.)

Gentlemen:

Please be advised that the National Grievance Committee, on September 8, 1977, unanimously adopted a motion that the National Grievance Committee notes that the Employer has taken the position with regard to this request for an interpretation that the issue is not arbitrable. The issue of arbitrability will be decided by the Court. Setting that issue aside, the Committee will render an interpretation of the agreement as it believes it has the jurisdiction to do and is required to do under the terms of the contract. The interpretation is as follows:

> It is the intent of this Section, Article 39, Section 3, to authorize either the National Freight Negotiating Committee, as representative of the Unions, or the Associations, as representative of the Employers (or in the case of an unrepresented Employer, such individual Employer), unilaterally to determine when economic recourse (strike or lockout) was

> necessary if no agreement had been reached on proposed revisions by April 1, 1976. Therefore, on the facts of this case, the strike activity was permitted by Article 39, Section 3, and was not in violation of any other provision of the Agreement.

Very truly yours,

Frank E. Fitzsimmons

Union Chairman

John Murphy

Employer Chairman

APPENDIX I

1967-1970 NATIONAL MASTER FREIGHT AGREEMENT

ARTICLE 8 -- National Grievance Procedure

(a) All grievances or questions of interpretation arising under this Master Agreement or Supplemental Agreements thereto shall be processed as set forth below. If such Supplemental Agreements provide for arbitration of discharges, such procedure shall be continued.

(1) All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement, (or factual grievances arising under the National Master

Agreement) shall be processed in accordance with the grievance procedure of such Supplemental Agreement. If upon the completion of such Supplemental grievance procedure, the matter is deadlocked and, as a result, a work-stoppage is threatened, which could involve more than one Conference Area, the matter shall be submitted to a Multi-Conference Committee composed of two employer representatives and two union representatives from each Conference Area involved. Such Multi-Conference Committee shall be convened by the Employer Secretary or the Union

Secretary of the National Grievance Committee after receipt of notice from the Employer or Union party to the dispute. The notice convening the Committee shall set forth the nature of the deadlocked grievance or interpretation involved, the parties to the dispute, the Conference Areas which are involved, and the employer or union representatives appointed to the Multi-Conference Committee. The Multi-Conference Committee shall meet at the mutually convenient time and place, but not later than 20 days after receipt of notice as aforesaid.

In the instance of a deadlocked factual grievance or interpretation arising under a Supplemental Agreement or a deadlocked factual grievance arising under the National Master Agreement, the decision of the Multi-Conference Committee shall be based solely upon the provisions of the applicable Supplemental Agreement or the National Master Agreement, whichever is applicable.

Any request for interpretation of the National Master Agreement shall be submitted directly to the Joint Area Committee from which it shall be immediately referred to the National Grievance Committee.

If the Multi-Conference Committee resolves the dispute by a majority vote of those present and voting, such decision shall be final and binding upon the parties. If the Multi--Conference Committee is deadlocked on the disposition of the dispute, the dispute shall be referred to the National Grievance Committee and handled as set forth in Paragraph 2 hereof.

(2) Any matter which has been referred pursuant to Paragraph

1, or any question concerning the interpretation of the provisions contained in the Master Agreement, shall be submitted to a permanent National Grievance Committee which shall be composed of five members designated by the Employers and five members designated by the unions. The National Grievance Committee shall meet quarterly for the disposition of grievances referred to it, or may meet at more frequent intervals, upon call of the Chairman of either the employer or union representatives on the National Grievance Committee. The National

Grievance Committee shall adopt rules of procedure which may include the reference of disputed matters to sub-committees for investigation and report, with the final decision or approval, however, to be made by the National Grievance Committee. If the National Grievance Committee resolves the dispute by a majority vote of those present and voting, such decision shall be final and binding upon the parties.

If the National Grievance Committee is deadlocked on the disposition of the dispute then either party shall be entitled to all lawful economic recourse to support its position in the matter. In considering factual disputes that are deadlocked and may affect more than one Conference or deadlocked questions of interpretation involving more than one Conference arising out of Supplemental Agreements, the decision of the National Grievance Committee shall be based solely on the provisions of the applicable Supplemental Agreement.

(b) The National Grievance Committee by majority vote may consider and review all questions of interpretation which may arise under the provisions contained in the Master Agreement which are submitted by either the Union Area Director or the designated Employer representative; and shall have the authority to reverse and set aside the majority interpretation of any area, regional, or local grievance committee if, in its opinion, such interpretation is contrary to the provisions set forth in the Master Agreement, in which case the decision of the National Grievance Committee shall be final and binding.

(c) Any provision in the grievance procedure of any Supplement hereto which would require deadlocked disputes to be determined by any arbitration process shall be null and void as to any agreements involving interpretation of the Supplemental Agreement or this National Master Agreement. The decision of the National Grievance Committee as to whether a grievance involves an interpretation which is subject to this procedure shall be final and conclusive.

(d) In the event of strikes, work stoppages, or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions, no interpretation of this Agreement by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement. Nothing herein shall prevent legal proceedings by the Employer where the strike is in violation of this Agreement.

[(e) deleted]

ARTICLE 9 -- Protection of Rights

Section 1 -- Picket Lines

It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement and including primary picket lines at the Employer's places of business.

Section 2 -- Struck Goods

It shall not be a violation of this Agreement and it shall not be cause for discharge or disciplinary action if any employee refuses to perform any service which his Employer undertakes to perform as an ally of an Employer or person whose employees are on strike, and which service, but for such strikes, would be performed by the employees of the Employer or person on strike.

Section 3 --

Subject to Article 32 hereof (Subcontracting), the Employer agrees that it will not cease or refrain from handling, using, transporting, or otherwise dealing in any of the products of any other employer or cease doing business with any other person, or fail in any obligation imposed by the Motor Carriers' Act or other applicable law, as a result of individual employees exercising their rights under this Agreement or under law, but the Employer shall notwithstanding any other provision in this Agreement, when necessary, continue doing such business by other employees.

Section 4 --

The layover provisions of the applicable Supplemental Agreement shall apply when the employer knowingly dispatches a road driver to a terminal at which a primary picket line has been posted as a result of the exhaustion of the grievance procedure, or after proper notification of a picket line permitted by the collective bargaining agreement, or economic strikes occurring after the expiration of collective bargaining agreements or to achieve a collective bargaining agreement.

Section 5 -- Grievances

Within five (5) working days of filing of grievance claiming violation of this Article, the parties to this Agreement shall proceed to the final step of the grievance procedure, without taking any intermediate steps, any other provision of this Agreement to the contrary notwithstanding.

ARTICLE 28 -- Sympathetic Action

In the event of a labor dispute between any Employer, party to this Agreement, and any International Brotherhood of Teamsters' Union, parties to this or any other International Brotherhood of Teamsters' Agreement, during the course of which dispute such Union engages in lawful economic activities which are not in violation of this or such other Agreement, then any other affiliate of the International Brotherhood of Teamsters, having an Agreement with such Employer shall have the right to engage in lawful economic activity against such Employer in support of the above first-mentioned Union notwithstanding anything to the contrary in this Agreement or the International Brotherhood of Teamsters' Agreement between such Employer and such other affiliate.

ARTICLE 37 -- Duration

Section 1 --

This Agreement shall be in full force and effect from April 1, 1967, to and including March 31, 1970, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

Section 2 --

Where no such cancellation or termination notice is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions in this Agreement, either party may serve upon the other a notice at least sixty (60) days prior to March 31, 1970, or March 31st of any subsequent contract year, advising that such party desiras to revise or change terms or conditions of such Agreement.

Section 3 --

Revisions agreed upon or ordered shall be effected as of April 1, 1970, or April 1st of any subsequent contract year. The respective parties shall be permitted all legal or economic recourse to support their requests for revisions if the parties fail to agree thereon.

Section 4 --

In the event of an inadvertent failure by either party to give the notice, set forth in Sections 1 and 2 of this Article, such party may give such notice at any time prior to the termination or automatic renewal date of this Agreement. If a notice is given in accordance with the provisions of this Section, the expiration date of this Agreement shall be the sixty-first (61st) day following such notice.

1970-1973 NATIONAL MASTER FREIGHT AGREEMENT

ARTICLE 7 -- Local and Area Grievance Machinery

Provisions relating to Local, State and Area Grievance Machinery are set forth in the applicable Supplements to this Agreement.

The procedure set forth in the Local, State and Area grievance machinery and in the National Grievance procedure may be invoked only by the authorized Union representative or the Employer.

Authorized representatives of the Union may file grievances alleging violation of the Agreement, under local grievance procedure, or as provided herein. Time limitations regarding the filing of grievances, if not set forth in the respective Supplemental Agreements, must appear in the Rules of Procedure of the various grievance committees and shall apply equally to Employers and employees.

ARTICLE 8 -- National Grievance Procedure

(a) All grievances or questions of interpretations arising under this Master Agreement or Supplemental Agreements thereto shall be processed as set forth below. If such Supplemental Agreements provide for arbitration of discharges, such procedure shall be continued.

(1) All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement, (or factual grievances arising under the National Master Agreement) shall be processed in accordance with the grievance procedure of the applicable Supplemental Agreement.

If upon the completion of the grievance procedure of the Supplemental Agreement the matter is deadlocked, the case shall be immediately forwarded to both the Employer and Union Secretaries of the National Grievance Committee, together with all pertinent files, evidence, records and committee transcripts.

Any request for interpretation of the National Master Agreement shall be submitted directly to the Conference Joint Area Committee for the making of a record on the matter, after which it shall be immediately referred to the National Grievance Committee. Such request shall be filed with both the Union and Employer

Secretaries of the National Grievance Committee with a complete statement of the matter.

(2) Any matter which has been referred pursuant to Paragraph 1, or any question concerning the interpretation of the provisions contained in the Master Agreement, shall be submitted to a permanent National Grievance Committee which shall be composed of an equal number of Employer and Union representatives. The National Grievance Committee shall meet quarterly, for the disposition of grievances

referred to it, or may meet at more frequent intervals, upon call of the Chairman of either the Employer or Union representatives on the National Grievance Committee. The National Grievance Committee shall adopt rules of procedure which may include the reference of disputed matters to subcommittees for investigation and report, with the final decision or approval, however, to be made by the National Grievance Committee. If the National Grievance Committee resolves the dispute by a majority vote of those present and voting, such decision shall be final and binding upon all parties.

If the National Grievance Committee is deadlocked on the disposition of the dispute then either party shall be entitled to all lawful economic recourse to support its position in the matter. In considering factual disputes that are deadlocked or deadlocked questions of interpretation arising out of Supplemental Agreements, the decision of the National Grievance Committee shall be based solely on the provisions of the applicable Supplemental Agreement.

(NOTE: The parties have agreed that within sixty (60) days following the end of the first year of this agreement, the National Grievance Committee shall review the operation of the above National Grievance Procedure to determine whether there has been a substantial increase in the case load arising from the fact that deadlocked cases which may result in work stoppages in only one Conference are for the first time being reviewed by the National Grievance Committee. If the parties deadlock on such determination then the National Grievance Procedure appearing in the 1967-1970 Agreement establishing Multi-Conference Committees and limiting the jurisdiction of the National Grievance Committee in part to deadlocks which may result in strikes in more than one Conference shall be reinstituted for the balance of the term of this Agreement.)

(3)

Work Stoppages

(a) It is mutually agreed that the Local Union will, within two weeks of the date of the signing of this Agreement, serve upon the Employer a written notice listing the Union's authorized representatives who will deal with the Employer, make commitments for the Local Union generally and, in particular, those individuals having the sole authority to act for the Local Union in calling or instituting strikes or any stoppages of work which are not in violation of this Agreement. The Local Union may from time to time amend its listing of authorized representatives by certified mail. It is further agreed that in all cases of an unauthorized strike, slowdown, walkout, or any unauthorized cessation of work in violation of this Agreement the Local Union shall not be liable for damages resulting from such unauthorized acts of its members.

In the event of a work stoppage, slowdown, walkout, or cessation of work in violation of this Agreement, the Employer shall immediately send a wire to the appropriate Area Conference to determine if such strike, etc. is authorized. No strike, slowdown, walkout or cessation of work in violation of this Agreement shall be deemed to be authorized unless notification thereof by telegram has been received by the Employer and Local Union from such Area Conference. If no response is received by the Employer within twenty-four (24) hours after request, excluding Saturday, Sunday and holidays, such strike, etc. in violation of this Agreement shall be deemed to be unauthroized by the Area

Conference for the purposes of this Agreement.

In the event of an unauthorized work stoppage or picket line, etc., in violation of this Agreement, the Local Union shall immediately make every effort to persuade the employees to commence the full performance of their duties and shall immediately inform the employees that the work stoppage and/or picket line is unauthorized and in violation of this Agreement. The question of whether employees who refuse to work during such unauthorized work stoppages, in violation of this Agreement, or who fail to cross unauthorized picket lines at their Employer's premises shall be considered as participating in an unauthorized work stoppage in violation of this Agreement, may be submitted to the grievance procedure, but not the amount of suspensions herein referred to.

It is specifically understood and agreed that the Employer, during the first twenty-four (24) hour period of such unauthorized work stoppage in violation of this Agreement, shall have the sole and complete right of reasonable discipline, including suspension from employment, up to and including thirty (30) days, but short of discharge, and such employees shall not be entitled to or have any recourse to the grievance procedure. In addition, it is agreed between the parties that if any employee repeats any such unauthorized strike, etc., in violation of this Agreement, during the term of this Agreement, the Employer shall have the right to further discipline or discharge such employee without recourse for such repetition. After the first twenty-four (24) hour period of an unauthorized stoppage in violation of this Agreement, and if such stoppage continues, the Employer shall have the sole and complete right to immediately further discipline or discharge any employee participating in any unauthorized strike, slowdown, walkout, or any other cessation of work in violation of this Agreement, and such employees shall not be entitled to or have any recourse to the grievance procedure. The suspension or discharge herein referred to shall be uniformly applied to all employees participating in such unauthorized activity. The Employer shall have the sole right to schedule the employees' period of suspension.

The International Brotherhood of Teamsters, the Area Conference, and Local Union shall make immediate efforts to terminate any strike or stoppage of work as aforesaid, which is not authorized by such organizations, without assuming liability therefor. It is understood and agreed that the failure by the International

Brotherhood of Teamsters and/or the Area Conference to authorize a strike by a Local Union shall not relieve such Local Union of liability for a strike authorized by it and which is in violation of this Agreement.

(b) The question of whether the International Union, an Area Conference, or a Local Union, separately or jointly, participated in an unauthorized work stoppage, slowdown, walkout or cessation of work in violation of this Agreement by calling, encouraging, assisting or aiding in such stoppage, etc., in violation of this Agreement, or whether an Employer engaged in a lockout in violation of this Agreement, shall be submitted to the grievance procedure at the national level, prior to the institution of any damage suit action. When requested, the Co-Chairmen of the National Grievance Committee shall immediately appoint a sub-committee to develop a record by collecting evidence and hear testimony, if any, on the sole question of Union participation or Employer lockout in violation of this Agreement. The record shall be immediately forwarded to the National Grievance Committee for decision. If a decision is not rendered within thirty (30) days after the Co-Chairmen have convened the National Committee, the matter shall be considered deadlocked.

A majority decision of the National Grievance Committee on the question of Union participation or Employer lockout in violation of this Agreement shall be final and binding on all parties. If such majority decision is rendered in favor of one or more of the Union entities, or the Employer, in the case of lockout, no damage suit proceedings on the issues set forth in this Article shall be instituted against such Union entity or such Employer. If, however, the National Grievance Committee is deadlocked on the issues referred to in this subsection 3 (b), either party may institute damage suit proceedings, but the record of the National Grievance Committee and its Subcommittee shall not be offered in evidence by either party for any purpose. Except as provided in this subsection 3 (b), agreement to utilize this procedure shall not thereafter in any way limit or constitute a waiver of the right of the Employer or Union to commence damage suit action. However, the use of evidence in this procedure shall not waive the right of the Employer or Union to use such evidence in any litigation relating to the strike or lockout, etc. in violation of this Agreement. There shall not be any strike, slowdown, walkout, cessation of work or lockout as a result of a deadlock of the National Grievance Committee on the questions referred to under this subsection 3 (b), and any such activity shall be considered a violation of this Agreement.

Nothing herein shall prevent the Employer or Union from securing remedies granted by law except as specifically set forth in this subsection 3 (b).

8(b) The National Grievance Committee by majority vote may consider and review all questions of interpretation which may arise under the provisions contained in the Master Agreement which are submitted by either the Union Area Director or the designated Employer representative; and shall have the authority to reverse and set aside the majority interpretation of any area, regional, or local grievance committee if, in its opinion, such interpretation is contrary to the provisions set forth in the Master Agreement, in which case the decision of the National Grievance Committee shall be final and binding.

8(c) Any provision in the grievance procedure of any Supplement hereto which would require deadlocked disputes to be determined by any arbitration process shall be null and void as to any grievances involving interpretation of the Supplemental Agreement or this National Master Agreement. The decision of the National Grievance Committee as to whether a grievance involves an interpretation which is subject to this procedure shall be final and conclusive.

8(d) In the event of strike, work stoppages, or other activities which are permitted in case of deadlock, default or failure to comply with majority decisions under this Agreement or any Supplement thereto, no interpretation of this Agreement or any Supplement thereto by any tribunal shall be binding upon the Union or affect the legality or lawfulness of the strike unless the Union stipulates to be bound by such interpretation, it being the intention of the parties to resolve all questions of interpretation by mutual agreement.

[8(e) deleted]

8(f) All local, area, and national grievance committees as constituted under this agreement shall have the jurisdiction and power to decide grievances which arose under the preceding agreements and supplements thereto, applying, however, the contract under which the grievance arose.

ARTICLE 9 -- "Protection of Rights"
Identical Language to 1967-1970 NMFA

ARTICLE 39 -- Duration
Section 1 --
This Agreement shall be in full force and effect from April 1, 1970, to and

including June 30, 1973, and shall continue from year to year thereafter unless written notice of desire to cancel or terminate the Agreement is served by either party upon the other at least sixty (60) days prior to date of expiration.

Section 2 --

Where no such cancellation or termination notice is served and the parties desire to continue said Agreement but also desire to negotiate changes or revisions in this Agreement, either party may serve upon the other a notice at least sixty (60) days prior to June 30, 1973, or June 30th of any subsequent contract year, advising that such party desires to revise or change terms or conditions of such Agreement.

Section 3 --

Revisions agreed upon or ordered shall be effective as of July 1, 1973, or July 1st of any subsequent contract year. The respective parties shall be permitted all legal or economic recourse to support their requests for revisions if the parties fail to agree thereon.

Section 4 --

In the event of an inadvertent failure by either party to give the notice set forth in Sections 1 and 2 of this Article, such party may give such notice at any time prior to the termination or automatic renewal date of this Agreement. If a notice is given in accordance with the provisions of this Section, the expiration date of this Agreement shall be the sixty-first (61st) day following such notice.

No. 82-369

In The

Supreme Court of the United [illegible]

October Term, 1982

Brotherhood of Teamsters & Auto Truck Drivers,
Local 70,
Petitioner,
vs.
California Trucking Association, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Are any "special and important reasons" for granting a writ of certiorari within the meaning of this Court's Rule 17 presented by the Ninth Circuit Court of Appeals' holding that there was no clear error in the District Court's rejection of Petitioner's defense that Respondents had failed to exhaust mandatory contractual dispute-resolution procedures, where the District Court's decision was based on Petitioner's repudiation of the collective bargaining agreement containing those procedures and where the Petitioner's repudiating conduct occurred before the District Court?

B. Are any "special and important reasons" for certiorari presented by the Ninth Circuit Court of Appeals' holding that there was no clear error in the District Court's finding that Petitioner's strike violated the applicable collective bargaining agreement?

C. Are any "special and important reasons" for certiorari presented by the Ninth Circuit Court of Appeals' holding that there was no clear error in the District Court's finding that Petitioner is liable for substantial damages that occurred when Respondents' employees outside of Petitioner's bargaining unit respected picket lines established by Petitioner in furtherance of its strike, where the District Court concluded that said damages were proximately caused by Petitioner's contract violation and were reasonably foreseeable?

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No. 82-363

IN THE

Supreme Court of the United States

October Term, 1982

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70,
Petitioner,
vs.
CALIFORNIA TRUCKING ASSOCIATION, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents[1] (the Employers) seek in this action to recoup damages suffered in consequence of a strike mounted by Petitioner (the Union or Local 70) in the spring of 1970 in violation of a collective bargaining agreement in effect between the parties.

The Union is the collective bargaining representative of truck drivers employed by the Employers. On April 1, 1967, the parties, members of a multiple-party bargaining group, entered into a collective bargaining agreement governing the terms and conditions of employment of the covered drivers. That contract consisted of two documents: (1) the "National Master Freight Agreement" (the Master Agreement) and (2) the "Local 70 Pickup and Delivery Supplemental Agreement", also known as the "Joint Council 7 Local Pickup and Delivery Supplemental Agreement" (the Supplemental Agreement). As specified in Article 37 of the Master Agreement, that contract was to last at least from April 1, 1967 through March 31, 1970,[2] and would automatically continue from year to year unless either party gave timely notice that it wished to cancel. If no such notice were served, but the parties desired "to continue said Agreement but also . . . to negotiate changes or revisions", either party might serve notice of its desire to negotiate amendments.

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[1] Respondents, Plaintiffs below, include twenty-seven motor carriers engaged in hauling general commodities and their collective bargaining representative (collectively referred to as the trucking employers), and two companies engaged in the manufacture and distribution of snack foods (the snack-food employers). Pursuant to United States Supreme Court Rule 28.1, Respondents make the necessary disclosures about their corporate status and affiliates in the Appendix hereto.

Neither party served timely notice of intent to cancel the 1967-1970 contract. Instead, Local 70, through its bargaining representative, the International Brotherhood of Teamsters, served timely notice of its intent to continue the contract and negotiate amendments thereto pursuant to Article 37, Section 2 of the Master Agreement.

Negotiations on the amendments began in early 1970. The only evidence contained in the record about the progress of negotiations is that on April 2, 1970, the bargaining representatives of the parties agreed on all terms of the amendments to the contract without ever having reached impasse.[3] The amendments became effective when ratified by the full membership of the International Brotherhood of Teamsters on May 18, 1970.[4]

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[2] Accordingly, this collective bargaining agreement will be identified as the 1967-1970 contract.

[3] To the extent that the Union means anything else by its statement, at pp. 4-5 of its Petition for Writ of Certiorari (Petition), that "[i]t is undisputed that there was a failure to agree upon any revisions until April 2, 1970, when a 'tentative settlement' was agreed upon", the Union misrepresents the record. Indeed, there is no record evidence that any bargaining party ever made any proposal that was at any time rejected by its counterpart across the bargaining table.

On April 1, 1970, while collective bargaining was still ongoing, the Union commenced strike activity against roughly half of the trucking employers.[5] Local 70's agents appeared at the Employers' terminals, instructed employees who were members of the Union to leave their jobs, and established picket lines. On the morning of April 3, *after* the bargaining representatives had reached agreement, Local 70 expanded its strike to include all of the trucking employers. Later that day, Local 70's membership ratified the strike by an overwhelming vote. Also on April 3, the trucking employers brought a breach-of-contract action in state court, pursuant to which a state court injunction issued. When Teamsters Joint Council 7 passed a motion on April 7 requiring Local 70 to instruct its members to return to work, the Union complied, and most striking employees returned to work on April 8.

Local 70's strike activity was motivated by its dissatisfaction with the multiple-party negotiations on the amendments to the 1967-1970 contract and its desire to break away from the multi-union bargaining group.[6] The same reasons led to the resumption of Local 70's strike activities against the trucking employers in early May, activities which continued throughout the month. On May 14 and 15, 1970, the Union extended its strike to the snack-food employers, who promptly filed a state court action for injunctive and monetary relief. The lawsuits of both the trucking employers and the snack-food employers were removed to the United States District Court for the Northern District of California, where they were consolidated.

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[4] The 1967-1970 contract as modified by these agreed-upon amendments will be identified as the 1970-1973 contract.

[5] At p. 5 of its Petition, Local 70 disingenuously states that "[a]s of midnight, March 31, 1970, there was no agreed-upon collective bargaining agreement, and Local 70 took strike action . . . ." Unless the Union means only that the parties had not completed their negotiations on the amendments to the 1967-1970 contract, the Union misrepresents the record. As stated above, Article 37 of the 1967-1970 Master Agreement gave Local 70 two choices regarding the 1967-1970 contract's duration: either give notice of intent to cancel, which the Union did not do, or give notice of intent to continue the existing contract and seek amendments, which the Union did do. Consequently, the courts below held that the 1967-1970 contract did continue in force from midnight, March 31, 1970, through May 17, 1970.

[6] At p. 5 of its Petition, the Union states that "[t]he court below found that Local 70 initiated the strike action at a time when no agreement was reached . . . ." The fact is that the courts below ruled that the 1967-1970 contract was in effect when Local 70 struck and remained in effect through May 17, 1970. *See* note 5, *supra*.

The impact of Local 70's April and May strike was such that the Employers were unable to engage in revenue-generating operations while the strike continued. The Employers have proceeded along various legal avenues to ameliorate the adverse effects of Local 70's strike, which the Employers contend violated both the federal labor laws and the parties' collective bargaining agreement. The Union has consistently litigated each proceeding to the hilt and exhausted its appeals, but it has not succeeded in persuading any tribunal that its strike was activity permitted under either law or contract.

The lawfulness of the strike, which the trucking employers charged constituted an unfair labor practice, was litigated before the National Labor Relations Board (NLRB) in October 1970 and January and February 1971. Throughout the hearings conducted by the NLRB, the Union denied being bound by the 1970-1973 amendments to the 1967-1970 contract. The NLRB ultimately concluded that Local 70 had violated the National Labor Relations Act by striking to force the Employers out of the established multi-employer bargaining unit.[7]

When the Union refused to comply with the NLRB's decision and order, the NLRB petitioned the Ninth Circuit Court of Appeals for enforcement. The Court of Appeals granted enforcement,[8] and this Court denied certiorari.[9] Finally, on November 21, 1973, approximately five months after the 1970-1973 contract had expired, Local 70 signed a notice agreeing to honor that contract.[10]

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[7] *Teamsters Local No. 70 (California Trucking Association)*, 194 N.L.R.B. 674 (1972).

For almost three years, the Union had maintained in the proceedings before both the NLRB and the District Court that it was not bound to any collective bargaining agreement during the period of the strike. However, once the Ninth Circuit Court of Appeals enforced the NLRB's decision and the Union could no longer deny being bound by the 1970-1973 contract, Local 70, attempting to turn its newly accepted contractual obligations to its advantage, changed its tactics and began arguing to the District Court that the Employers were required to exhaust mandatory grievance procedures set forth in the very contract that for years the Union had refused to acknowledge. Nevertheless, the Union continued to deny that it was bound by the provisions of the 1967-1970 contract during the period of the strike. Moreover, Local 70 chose not to move for a stay of the proceedings, but instead contented itself with demanding dismissal of the action on the ground that the damage claims had to be arbitrated.

When it came time finally to decide the case, the District Court faced, as a threshold question to the merits of the Employers' damage claims for breach of contract, the issue of whether there was any substance to the Union's belated non-exhaustion defense. The District Court ruled against Local 70 on the ground that the Union was estopped from asserting its defense by virtue of its repeated repudiation of the contract in its actions before the District Court.

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[8] *NLRB v. Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70*, 470 F.2d 509 (9th Cir. 1972).

[9] *Brotherhood of Teamsters & Auto Truck Drivers, Local No. 70 v. NLRB*, 414 U.S. 821 (1973).

[10] A similar scenario was enacted pursuant to unfair labor practice charges filed by the snack-food employers. *See Teamsters Local No. 70 (Granny Goose Foods)*, 195 N.L.R.B. 454 (1972), *enf'd*, No. 72-1756 (9th Cir. 1972).

The record before the District Court established that, for too many years, the Union had proceeded on the premises that no collective bargaining agreement was in force during the strike and that the District Court was the proper forum for the resolution of the Employers' claims. Local 70, in separate answers to the trucking employers' action and the snack-food employers' action, had denied that it was party to the collective bargaining agreements allegedly breached. The answer to the trucking employers' complaint specifically alleged, as an affirmative defense, that the complaint showed no breach of contract because the collective bargaining agreement expired on March 31, 1970. Consistent with this allegation, Local 70 persistently maintained that it was not bound to the 1967-1970 contract after March 31, 1970 and that the Employers could not, and did not, prove the existence of *any* contract during the period April 1 through May 17, 1970.

In addition to denying it was bound to any collective bargaining agreement during the strike, Local 70 conducted its defense in a manner completely inconsistent with a genuine desire to have the dispute processed through contractual procedures. For one thing, the Union substantially invoked the District Court's jurisdiction by filing various motions on the merits without indicating in any way that it wished to reserve a right to insist upon arbitration. For another thing, Local 70 expressly asserted that it desired a trial in the District Court.[11]

Indeed, even when Local 70 finally did begin to claim that the Employers had failed to exhaust mandatory contractual procedures, it still fell short of expressing a genuine desire to arbitrate and never demanded arbitration. The Union first suggested its non-exhaustion defense on January 18, 1973, in opposition to a summary judgment motion. It made no cross motion to compel arbitration. Nearly a year went by before Local 70 made any motion at all based on its new defense. Then, in the late fall of 1973, in May, August, and December of 1974, and again in April 1975, the Union moved for summary judgment on the ground that the District Court could not take jurisdiction of the damage claims because various issues had not first been submitted to the contractual grievance procedures. While the Union expressed its desire to have those claims dismissed, it failed to indicate that it wished to arbitrate, and at no time did it move the District Court to stay the proceedings pending an arbitral determination of the validity of the non-exhaustion defense.

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[11] The Union did so both in an offensive posture, where in one of its motions it expressed a preference for "a speedy trial before [the District] Court", and in a defensive posture, where in an opposition to a summary judgment motion it declared that granting summary judgment "would deprive [the Union] of the right to a jury trial".

In fact, during the nearly seven years of proceedings before the District Court, Local 70 made only one request for submission of any issue to the contractual grievance procedures, and that on the day trial was originally scheduled to commence, approximately four and one-half years after the filing of the lawsuit. At that time, the Union sought a stay of the court proceedings pending submission to the contractual procedures of the single issue of which collective bargaining agreement covered the dispute. And even then, the Union's argument in favor of its motion suggested that it preferred a court trial on the remaining issues.[12]

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[12] The Court of Appeals noted that Local 70, in support of its motion for a stay, had argued as follows:

> If the National Grievance Committee determines that the claims are governed by the 1970-1973 agreement through and including April 1, 1970, then this Court can proceed based upon a suit which alleges a breach of that collective bargaining agreement. If the National Grievance Committee determines that it has no jurisdiction over claims except those occurring on or after May 18, 1970, then this Court can safely proceed with a suit based upon the 1967-1970 National Master Freight Agreement. In the

(footnote continued on following page)

With this record of repudiation, the District Court ruled that Local 70 was estopped from contending that the Employers could not sue before they grieved their damage claims. The District Court then proceeded to adjudicate the merits of the Employers' claims, ultimately holding that the Union's strike violated the 1967-1970 contract and that the Union was liable to the Employers for approximately three million dollars in damages.

After exhausting various post-trial remedies, Local 70 appealed the judgment to the United States Court of Appeals for the Ninth Circuit. The Court of Appeals affirmed,[13] finding no clear error in the District Court's determination that Local 70's actions in the lawsuit constituted a repudiation of the applicable collective bargaining agreement and that, therefore, the Union had waived and was estopped from raising any non-exhaustion argument. The Court of Appeals also found no clear error in the District Court's findings that Local 70's strike breached the contract and that the Employers had suffered certain damages thereby.

SUMMARY OF ARGUMENT

Petitioner has presented no "special and important reasons" for certiorari. In its Petition, the Union makes three basic arguments: (1) this Court should decide that the arbitrator, not a court, must determine the arbitrability of a grievance where that question involves an interpretation of a labor agreement; (2) the District Court erred in holding

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> alternative, if the National Grievance Committee deadlocks over these issues then under either the 1967-1970 or the 1970-1973 agreement, this Court can safely proceed, with the intention of the parties contained in both agreements having been clearly effectuated . . . .

Petition for Writ of Certiorari, Appendix A at 29 n.9 (emphasis deleted). Further references to the appendices to the Petition will be made in the form "Pet. App. ___ at ___ ."

[13] The Court of Appeals remanded as to certain calculations of a portion of the damages; as to all other points, it affirmed.

that the Union's strike breached the collective bargaining agreement; and (3) the District Court erred in assessing certain damages. None of these arguments satisfies the requirements of this Court's Rule 17 for granting a writ of certiorari.

The Union contends that federal courts disagree about who is to determine the arbitrability of disputes between contracting parties when arbitrability turns on interpretation of the contract, and it argues further that the decisions of the courts below fall on the wrong side of the split of authority. However, regardless of whether such a conflict exists, it is irrelevant to this case. The Court of Appeals expressly ruled that the District Court was correct to find that Local 70's conduct before the District Court constituted a repudiation of the applicable collective bargaining agreement, including the grievance procedures contained therein. Having repudiated the contract, Petitioner is estopped from contending that *any* issue in this case — whether of arbitrability itself or of the merits of the underlying dispute — must have been submitted to the contract's grievance procedures before the Employers could bring suit.

The Union does not challenge the courts' right to determine whether a repudiation occurred. Instead, Local 70 argues that exhaustion of contractual grievance procedures is a jurisdictional requirement and that, therefore, the Union cannot be estopped from raising it as a defense, even though belatedly and inconsistently. However, Local 70 is wrong to contend that arbitrability is not a waivable defense. Subject-matter jurisdiction over this action is given by Congress to the courts in Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185, and nothing in a private contract can alter that. When federal courts decline to hear disputes that the parties had agreed would be subject to the mandatory grievance procedures of collective bargaining agreements, they do so to honor the national policy favoring labor arbitration, not because the private agreements strip them of congressionally bestowed jurisdictional power.

The Union's second basic contention is that, for three reasons, the lower courts erred in holding that Local 70's strike breached the applicable collective bargaining agreement. The focus of this argument is on this Court's *Lucas Flour* decision,[14] which held that a collective bargaining agreement that contains a mandatory arbitration clause will be deemed also to contain an implied no-strike clause of equal breadth.

The Union argues that the lower courts' recognition of such an implied no-strike provision was erroneous because the applicable contract provides for dispute resolution by a joint labor-management committee rather than by an arbitrator. Even apart from the anomaly of the Union's arguing that the contractual procedures do not qualify as arbitration for *Lucas Flour* purposes immediately after arguing that those same procedures do qualify as arbitration for purposes of divesting the courts of jurisdiction, Local 70's position lacks merit. A mandatory grievance procedure such as is contained in the contract in this case is exactly the sort that implies a no-strike clause under *Lucas Flour*.

The Union also argues that no implied no-strike clause exists because the strike was not over a dispute that could be submitted to the contractual grievance procedures. But the Supplemental Agreement defines the scope of the grievance procedures extremely broadly to include "any grievance or controversy affecting the mutual relations of the Employer and the Union". Local 70 is surely not entitled to certiorari on the claim that the disputes that led to its strike, disputes over the progress of the national negotiations and the Union's demand for separate bargaining with each of the Employers, could not reasonably be held to have

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[14] *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962).

"affect[ed] the mutual relations" of the parties within the meaning of the contract.

Local 70's last challenge to the courts' finding of breach is that the lower courts' decisions improperly ignored a final and binding decision of the National Grievance Committee interpreting the portion of the contract that allows a strike where the negotiating parties "fail to agree" on revisions to the contract. The courts interpreted "fail to agree" to mean "impasse", but the Committee decision, Local 70 claims, says that strikes are allowed at any time before the parties arrive at an enforceable agreement to amend. Aside from the paradox created by the Union's relying on a purportedly final and binding grievance decision immediately after contending the grievance procedure differed from arbitration "because of its lack of finality", Local 70's contention lacks merit for several reasons. The decision was not a part of the record below, and the purportedly decisive interpretation of the "fail to agree" language simply does not say what Local 70 claims: on its face, it relates not at all to the 1967-1970 contract; on its face, it simply cannot be said to construe the phrase "fail to agree"; and, by its own terms, it is limited to the facts of the case presented to the grievance committee.

The Union's third and final proffered ground for the granting of a writ of certiorari is the contention that the lower courts erred in assessing certain damages. Specifically, Local 70 objects to being held responsible for damages occurring when employees who were not its members refused to cross the picket lines established by Local 70 in furtherance of the strike at the Employers' facilities. The Union tries to pique this Court's interest by characterizing the lower courts' rulings as examples of the inconsistent judicial treatment of sympathy-strike damages. But the Union's contention simply mistates the facts, for it is the consequences of the conduct of Local 70's pickets, not of the sympathy strikers, which is at issue. The lower courts found that the refusal of other employees to cross Local 70's picket lines was foreseeably and proximately caused by Local 70's strike. Relying on accepted standards for determining causation, the lower courts correctly held the Union accountable for its conduct.

ARGUMENT

A. The Courts Below Correctly Reached the Merits of the Action.

The Ninth Circuit Court of Appeals found no clear error in the District Court's decision to reach the merits of the Employers' damage claims despite Local 70's defense that the Employers had not exhausted mandatory contractual grievance procedures. The basis for the Court of Appeals' decision was that Local 70, by its conduct before the District Court, repudiated its contract status and thus was estopped from relying on the contract's arbitration provisions as a defense to the Employers' damage action arising out of the 1967-1970 contract. Pet. App. A at 31.

Local 70's first attempt to state "special and important reasons" for this Court's review challenges the propriety of the lower courts' reaching the merits. But rather than contesting the repudiation determination straight out, Local 70 introduces a red herring. The Union argues that the courts below improperly reserved to themselves the determination of the arbitrability issue raised by Local 70's defense of non-exhaustion of contractual remedies, rather than requiring that issue to be submitted to the contractual grievance procedure. Petition at 6-12. Local 70 acknowledges that the accepted rule is that arbitrability is an issue for the courts to decide, *id.* at 6, 8 n.7, but nevertheless attempts to interest this Court in its argument to the contrary by stating that the rule "has led to conflicting results in the federal court system", *id*. at 6. Local 70 goes on to say that the problem is that when the question of arbitrability itself turns on the interpretation of the applicable collective bargaining agreement "the courts have applied contradictory methodology", with the result that threshold questions of contractual interpretation have variously been determined by courts or remanded to arbitrators. *Id*. at 6-7. Local 70 concludes that "where the question of arbitrability is *also* of contractual interpretation . . . it should be normally decided through the arbitration procedure, contrary to the ruling of the court below." *Id*. at 7-8.[15]

This is all very interesting, but it has absolutely no bearing on this case. The Court of Appeals did not reach the merits by deciding that it, rather than an arbitrator, should determine whether the collective bargaining agreement required grievance of the Employers' damage claims as a precondition to suit. The Court of Appeals expressly did not decide whether there was any merit to Local 70's contention that the contract contained an exhaustion requirement. Pet. App. A at 32 & n.10. The Court of Appeals did not get to the questions Local 70 points to here because it ruled that the District Court's finding of a repudiation of the contract by Local 70 was not clearly erroneous. Local 70's repudiation estopped it from raising the non-exhaustion defense. Accordingly, Local 70's discussion of whether court or arbitrator should rule on the merits of that defense is simply beside the point.[16]

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[15] Local 70 does not directly face up to the ramifications of its position. The fact of the matter is that arbitrability *always* involves interpretation of the contract, inasmuch as it is the contract which defines arbitrability and a court will necessarily have to decide what the contract says. Consequently, to adopt Local 70's proposed rule would be to overrule the hitherto accepted axiom that arbitrability is for the courts to decide. Because this issue is immaterial to the dispositive issue of repudiation, however, we do not address it in greater detail here.

As is set forth more fully above,[17] for years while litigating in the District Court, Local 70 consistently denied that it was bound by any collective bargaining agreement during the strike, repeatedly indicated its desire to go to trial before the District Court, substantially invoked the District Court's process without reserving a right to demand arbitration, and failed to evince any genuine interest in having the dispute processed through the contractual grievance procedures. Accordingly, the District Court held, and the Court of Appeals agreed, that Local 70's actions in court constituted a complete repudiation of the applicable collective bargaining agreement and estopped Local 70 from raising any part of that agreement as a bar to the suit. *See Reid Burton Construction, Inc. v. Carpenters District Council,* 535 F.2d 598 (10th Cir.), *cert. denied,* 429 U.S. 907 (1976);

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[16] At pp. 8-12 of its Petition, Local 70 argues that there are four aspects of this case as to which the courts below improperly decided to interpret the contract, rather than defer to the grievance procedures, due to the "confusion created in the federal courts" by "contradictory approaches" to issues of arbitrability that rest on contractual interpretation. Local 70 states that, in each instance, "the courts interpreted the contract and rejected petitioner's requests that the matter be treated through the parties' grievance procedure." Petition at 12. At the outset, we note that Local 70 made no such "requests"; in roughly seven years of litigating before the District Court, Local 70 made only one request that any issue be referred to the contractual grievance procedures, and that request was limited to a single, narrow issue. *See* text accompanying notes 11-12, *supra*. Even apart from that, Local 70 is wrong to challenge the lower courts' interpretations of the contract on the basis of the law of arbitrability. The lower courts rested their decisions to interpret the contract on Local 70's repudiation of its contract status, which estopped Local 70 from raising the issues of non-exhaustion and of arbitrability. Whether the four contractual interpretations with which Local 70 takes issue would properly be made by a court in the absence of such a repudiation is immaterial. To put all this into other words, the issue of repudiation is simply the issue of whether the Employers are party to any binding agreement to arbitrate in the first place, a question which Local 70 concedes is "fully reserved to the court." Petition at 8 n.7.

[17] *See* text accompanying notes 7-12, *supra*.

E.T. Simonds Construction Co. v. Local 1330 of International Hod Carriers, 315 F.2d 291 (7th Cir. 1963).

The Union does not dispute the authority of the courts to determine the issue of repudiation, but instead argues that its repudiation is irrelevant because non-exhaustion of contractual remedies is a non-waivable jurisdictional defect. Petition at 12-15.[18] Local 70 instructs this Court that it "is compelled to resolve the question of whether exhaustion of contractual remedies by an employer is jurisdictional or not". *Id.* at 15.

The Union's position is literally incredible. It is not surprising that Local 70 does not cite authority for its proposition, for this Court long ago established that a party's actions may constitute repudiation of a collective bargaining agreement and may thereby waive a non-exhaustion defense. *Vaca v. Sipes*, 386 U.S. 171, 185 (1967). The lower federal courts have uniformly seen fit to recognize that rule. *See, e.g., Hayes v. New England Millwork Distributors, Inc.*, 602 F.2d 15, 18 (1st Cir. 1979); *Rabalais v. Dresser Industries, Inc.*, 566 F.2d 518, 519-20 (5th Cir. 1978); *Reid Burton Construction, Inc. v. Carpenter District Council*, 535 F.2d 598 (10th Cir.), *cert. denied*, 429 U.S. 907 (1976); *Beriault v. Local 40, Super Cargoes & Checkers*, 501 F.2d 258, 262 (9th Cir. 1974); *Smith v. Pittsburgh Gage and Supply Co.*, 464 F.2d 870, 875 (3d Cir. 1972); *E.T. Simonds Construction Co. v. Local 1330 of International Hod Carriers*, 315 F.2d 291 (7th Cir. 1963).

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[18] Local 70 also seems to argue that no repudiation occurred, but makes no effort to refute the dispositive facts. Local 70 attempts a little legerdemain by stating that the Court of Appeals was "dead wrong" to say that Local 70 had alleged it was not bound by the 1967-1970 contract and explaining that its position "was that, although bound by *that* agreement through March 31, 1970, the Union was not bound by the new agreement effective thereafter." *Id.* at 13. The malevolent misdirection is, of course, the March 31 date. The strike began on April 1. Local 70 consistently denied that it was bound by the 1967-1970 contract (or for that matter *any* collective bargaining agreement) *when it struck*, which is the only material time.

The reason for this rule is relatively simple. Subject-matter jurisdiction over an action for breach of a collective bargaining agreement is conferred by Section 301 of the Labor-Management Relations Act, 29 U.S.C. § 185. No private contract can affect that jurisdiction in any way. As the Court of Appeals for the First Circuit observed in *Rivera v. Sea Land of Puerto Rico, Inc.*, 418 F.2d 725 (1st Cir. 1969):

> [Arbitration] agreements . . . are not destructive of jurisdiction. They are, precisely, agreements, and as such may be pleaded as a personal defense. However, like any such right, they may be waived. . . . Plaintiffs' cases, to the effect that the court has no "jurisdiction" until agreed-on arbitration has been conducted, do not concern jurisdiction in the basic sense, but stand merely for the proposition that if either party seasonably claims his right to arbitrate, the agreement must be recognized.

Id. at 726.[19]

Accordingly, Local 70 has not presented any "special and important reasons" for reviewing the lower courts' decision to adjudicate the merits of the Employers' claims despite Local 70's belated defense of non-exhaustion of contractual remedies.

B. The Courts Below Correctly Held That Local 70's Strike Violated the Contract.

The Ninth Circuit Court of Appeals found no clear error in the District Court's ruling that Local 70's strike violated the 1967-1970 contract. The District Court held that the strike violated both a no-strike clause created by operation of law, Pet. App. C at 27-30, and an express contractual ban on strikes during negotiations, Pet. App. C at 31-34. Local 70 challenges the finding of breach and claims the courts below committed three errors which this Court should correct.

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[19] The First Circuit Court of Appeals' subsequent remarks are equally apposite here:

> Plaintiffs' suddenly discovered affection for arbitration came too late. They cannot proceed with an action until it proves unsuccessful, and then avoid the effect by pleading their own contractual breach in having brought it. Plaintiffs are seeking to play games with a court which the record shows has been more than patient with them.

Id.

First, Local 70 argues that the lower courts were wrong to find an implied no-strike clause in the contract under the doctrine of *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). Local 70 contends that *Lucas Flour* creates a no-strike clause by operation of law only where a collective bargaining agreement provides for final and binding arbitration. Petition at 15. In the contract at bar, it claims, the grievance procedures specifically exclude arbitration and do not necessarily provide for finality.

The Court of Appeals correctly resolved the issue against Local 70 on the ground that, so long as the parties expressed an intention to settle their disputes through arbitration, the appellation given to the procedure is immaterial. Pet. App. A at 36-38. *Lucas Flour* held that, where there is a duty to submit the underlying dispute to final and binding arbitration, a strike violates the collective bargaining agreement. The only way in which Local 70 distinguishes the contractual procedures from conventional arbitration is by alleging an absence of finality in the former. Local 70 infers the purported lack of finality from the composition of the grievance committee, which consists of an equal number of management and labor representatives. Yet Local 70 concedes that, so long as the contractual grievance committee does not deadlock, the decision does have finality. Petition at 16 n.16.[20]

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[20] If Local 70 means to say that, as a factual matter, deadlock occurs too frequently to leave the grievance procedures with the requisite degree of finality, its contention is unsupported by the record. Local 70 introduced no evidence on this issue. If Local 70 means to say that, as a matter of law, any grievance procedure that admits any possibility of no majority decision (because there is an even number of decisionmakers) lacks finality, Local 70 is simply wrong. Indeed, this Court itself has more than once rendered final decisions when an even number of Justices participated.

Moreover, Local 70 itself equates the contractual procedures with arbitration and invokes the policy favoring arbitration in support of its defenses. *See* Petition at 6-12. Indeed, in its opening brief to the Court of Appeals below, Local 70 took pains to explain why the contract's grievance procedures *should* be equated with arbitration:

> Here, the collective bargaining agreements do not contain provisions for final and binding arbitration in the sense that a neutral outside party makes the final decision except in discharge cases. Instead, the contracts contain an elaborate grievance machinery culminating in the National Grievance Committee, composed of equal numbers of employer and union representatives. This process of joint labor-management committees has some elements of negotiation as well as arbitration. *If anything, broader deference should be given to such an interpretive process than to the system of entrusting disputes to an outside arbitrator, since the parties have designed this procedure in order to preserve the parties' intention to interpret and apply their own agreement, and to maintain uniform interpretations throughout the industry*. In furtherance of this system, the contract specifically excludes arbitration as to most disputes . . . and limits the impact of tribunal interpretations. . . .

Brief for Appellant at 17 n.13 (emphasis added).

Local 70's own characterization of the contractual procedures makes quite clear that they form precisely the sort of dispute-resolution system contemplated by *Lucas Flour*. Indeed, *Lucas Flour* itself read a no-strike clause into a contract that provided for resolution of disputes by a "Board of Arbitration" consisting of two members: one representing management, one labor.[21] 369 U.S. at 96. Arbitration is not a magic name; what is protected is the means chosen by the parties to resolve their disputes. So long as the grievance committee *can* render a final and binding decision, as Local 70 concedes, the grievance procedure qualifies as arbitration. *See General Drivers, Local Union No. 89 v. Riss and Co.*, 372 U.S. 517, 519 (1963).

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[21] The grievance clause in the *Lucas Flour* contract also provided that, if these two "arbitrators" could not agree, a third decision-maker would be selected. The possibility of deadlock over the identity of such a third arbitrator did not eliminate finality in this Court's eyes; the parties evidently intended that resolution of disputes would normally be accomplished by decision of the two-member panel.

Local 70 can hardly claim that the Court of Appeals committed some error meriting this Court's review merely by holding that the District Court was not clearly erroneous to find that the contractual procedures were the parties' "chosen instrument for the definitive settlement of grievances under the Agreement". *Id.* The Court of Appeals was entitled to rely on Local 70's own characterization of the procedures. This Court's observation in *Lucas Flour* itself is apt here as well: "[A] contrary view would be completely at odds with the basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare." 369 U.S. at 105.[22]

Local 70's second challenge to the finding of breach also rests on *Lucas Flour*. Local 70 correctly states that a no-strike clause is properly implied only to the same extent to which there is a duty to submit the underlying dispute to the mandatory grievance procedures. Local 70 identifies the disputes underlying the strike as being over new terms and conditions of employment and Local 70's desire to break the Employers away from the multiple-party bargaining over amendments to the 1967-1970 contract. Local 70 claims that these disputes could not possibly be grievable and that the lower courts were wrong to hold to the contrary. Petition at 16-18. Local 70 adds that the Court of Appeals' ruling conflicts with decisions in one other court of appeals and three district courts and submits that this Court should clarify the *Lucas Flour* doctrine. *Id.* at 18 & n.18.

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[22] Local 70 submits that whether the *Lucas Flour* doctrine extends to grievance procedures such as in the case at bar was acknowledged to be an open question in *Chauffeurs, Teamsters and Helpers Local Union No. 795 v. Yellow Transit Freight Lines*, 370 U.S. 711 (1962), and should now be resolved by this Court. Petition at 16. As demonstrated above, however, the question is not an open one under the facts of this case. In addition, the *Yellow Transit* decision does not do what Local 70 says it does. *Yellow Transit* was a *per curiam* decision, the entire text of which is as follows: "Reversed. Sinclair Refining Co. v. Atkinson, 370 U.S. 195, 8 L. Ed. 2d 440, 82 S. Ct. 328." Furthermore, *Yellow Transit* involved a request for injunction requiring application of an entirely distinct body of law concerning the Norris-LaGuardia Act, 29 U.S.C. §§ 101-115, not to mention that the case on which the reversal was based was itself later overruled by this Court in *Boys Markets, Inc. v. Retail Clerks Union Local 770*, 398 U.S. 235 (1970).

Local 70 is wrong on all counts. As it concedes, the grievance procedures covered not only questions of contractual interpretation but also "any grievance or controversy affecting the mutual relations of the Employer and the Union." *Id.* at 9.[23] The Court of Appeals found no clear error in the District Court's finding of a relevant implied no-strike clause because "the uncontested language of the relevant contract provisions is all-inclusive." Pet. App. A at 36. This factual determination presents no issue requiring review by this Court. *See United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960).

Local 70 blusters that "[n]othing would suggest that the Union *could* grieve its claim for higher wages and different benefits" and that the Court of Appeals' ruling is "preposterous", Petition at 17, but the contract language, including as grievable all disputes "affecting the mutual relations" of the parties, speaks for itself. The cases Local 70 claims conflict with the Court of Appeals' decision, Petition at 18 n.18, are easily distinguishable: either the employer conceded the strike's underlying dispute was not arbitrable[24] or the contract's language narrowly defined the scope of the grievance procedure.[25] The Court of Appeals for the Ninth Circuit hardly committed an error so grievous as to warrant review in this Court by holding that the District Court properly found that a dispute over the Employers' right to participate in the national multiple-party bargaining could reasonably be thought to affect the mutual relations of the parties and therefore be subject to grievance.

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[23] At the cited portion of the Petition, Local 70 states that the "mutual relations" phrase represents coverage "*far broader* than that of the NMFA [Master Agreement] procedure" which provides for grievance only of questions of contractual interpretation. (Emphasis added.)

[24] *Emery Air Freight Corp. v. Local Union 295*, 449 F.2d 586, 591 (2d Cir. 1971), *cert. denied*, 405 U.S. 1066 (1972).

The Union's final challenge to the finding of breach rests on a purportedly dispositive decision of the National Grievance Committee. Local 70 observes that, in the contractual section dealing with negotiations to amend the contract, the agreement provides that " '[t]he respective parties shall be permitted all legal or economic recourse to support their requests for revisions if the parties fail to agree thereon.' " Petition at 18. Local 70 objects to the lower courts' finding that this "fail to agree" language expressly prohibited a strike so long as the parties had not come to an impasse in their negotiations.[26] The National Grievance Committee, Local 70 claims, "construed precisely this provision to permit economic action without impasse." *Id.* at 19. Local 70 goes on to say that this Court should be interested because the question presented "is whether a court may totally disregard the parties' definitive understanding of a contract as expressed in a joint grievance committee decision." *Id.*[27]

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[25] In *Automobile Transport, Inc. v. Ferdnance*, 420 F. Supp. 75 (E.D. Mich. 1976), the dispute lay between the strikers and their union and the arbitration clause contained "no provision for the arbitration of internal union disputes". *Id.* at 77. In *Coordinating Committee Steel Companies v. United Steelworkers*, 436 F. Supp. 208, 214 (W.D. Pa. 1977), and *Best Cranes, Inc. v. International Union of Operating Engineers, Local 139*, 93 L.R.R.M. 2994, 2996 (E.D. Wisc. 1976), the arbitration clauses were expressly limited to questions of contractual interpretation.

[26] Of course, Local 70's strike was in violation of the contract either if it breached an implied no-strike clause created by operation of law pursuant to *Lucas Flour*, *supra*, or if it violated the express limitation on strikes represented by the "fail to agree" language. In fact, as the District Court concluded, the strike breached both the express and the implied ban on strikes. *See* Pet. App. C at 27-34.

Local 70 is, to borrow a phrase, dead wrong.[28] First, Local 70 did not make the grievance committee's decision part of the record before the District Court. Indeed, the Union did not even bother to bring this "definitive understanding" of the parties[29] to either court's attention until some three years after the grievance decision was rendered and only a week or so before oral argument to the Court of Appeals. Accordingly, the District Court's interpretation of the contract's "fail to agree" language was made in ignorance of the purportedly decisive grievance decision, not in "disregard" of it as the Union contends. *See id.* at 19.

Second, the grievance committee's decision just does not say what Local 70 claims. That decision, reproduced as Appendix H to Local 70's Petition, on its face reveals no basis for concluding that the controversy it resolves is in any material way similar to that which faced the courts below. The document says nothing about interpreting the 1967-1970 contract, nor does it appear from the face of the document that it construes the "fail to agree" language at issue here. Moreover, by its own terms the grievance decision is limited to the facts of the case it decides. Pet. App. H at 3. Accordingly, the document creates no "special and important reasons" for certiorari.

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[27] At pp. 18-19 of its Petition, Local 70 also argues that the lower courts' equating failure to agree with impasse violated three "settled principles":

> (1) It implied a no-strike pledge where none existed; (2) It interfered with the parties' ability to resolve bargaining position [sic] through forces of economic contention; and (3) [It] misread the meaning of "impasse", which is decidedly different from a failure to agree.

Id. at 19. These arguments are spurious. The first "principle" begs the question: the very issue is whether a no-strike pledge existed. The second is circular: if a no-strike pledge existed then the parties themselves agreed to limit their economic warfare and the courts simply effectuated that agreement. The third is not a principle at all; whether "impasse" means the same as "fail to agree" in a collective bargaining agreement is a question of fact peculiar to the individual case which the courts below resolved against Local 70 on the factual record.

[28] *See id.* at 13.

[29] *Id.* at 19.

C. The Courts Below Assessed Only Damages that Were Proximately and Foreseeably Caused by Local 70's Strike.

Local 70's final proffered ground for certiorari is its allegation that the lower courts erred in assessing damages based on the refusal of certain employees to cross Local 70's picket lines even though those employees were not members of Local 70 and the picketing, in some instances, occurred at various of the Employers' facilities outside of Local 70's normal geographical jurisdiction. Petition at 20-21. Local 70 denies responsibility for work stoppages that constitute "sympathy strikes" and characterizes the lower courts' disagreement with Local 70's position as an example of inconsistent judicial treatment of damages in sympathy strikes. Local 70 concludes that, "[a]bsent a 'clear and unmistakable' contractual waiver of a union's right to cause work stoppages outside of its jurisdiction, the Union's actions in picketing other facilities cannot cause liability under [29 U.S.C.] section 185." *Id.* at 20.

The Ninth Circuit Court of Appeals correctly disposed of this argument on the observation that the Employers had sued on the basis of the conduct of Local 70, not that of the sympathy strikers. Pet. App. A at 48-53. Local 70's members, who were picketing in furtherance of their strike in violation of the 1967-1970 contract, foreseeably and proximately caused the work stoppages of the employees who would not cross the picket lines. Local 70 had control of the picket lines and could have pulled them at any time with the result that the work stoppages of the sympathy strikers would have ceased. But for Local 70's strike, the work stoppages would not have occurred.

This is the crucial distinction between this case and the authorities Local 70 cites. *See* Petition at 20. *NLRB v. Southern California Edison Co.*, 646 F.2d 1352, 1365 (9th Cir. 1981), and *Delaware Coca-Cola Bottling Co. v. General Teamster Local Union 326*, 624 F.2d 1182, 1184 (3d Cir. 1980), uphold the right of *sympathy strikers themselves* to engage in a sympathy strike absent a "clear and unmistakable" waiver in their collective bargaining agreement. But the contractual obligations of the sympathy strikers are not at issue here; it was the conduct of Local 70, which caused the sympathy strike, that was on trial below. Once the breach was established, Local 70 was liable for all foreseeably and proximately caused damages.

Local 70's reliance on *Eazor Express, Inc. v. International Brotherhood of Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. denied*, 424 U.S. 935 (1976), is equally misplaced, as the Court of Appeals explained. *Eazor* involved a wildcat strike by members of one union outside of that union's jurisdiction which precipitated a wildcat strike by members of another union. The court exonerated the first union from liability for the work stoppages of the second union's members because it held the first union had no control over the work stoppages of the second union's members and "was not in a position to take effective measures to get them back to work". *Id.* at 965. In the instant case, in contrast, it is not disputed that the sympathy strikers' work stoppage was a function of Local 70's picket lines, over which Local 70 had complete control.[30]

No "special and important" reasons for certiorari are presented by the Court of Appeals' conclusion that the District Court was not clearly erroneous in finding that Local 70's strike in violation of the contract foreseeably and proximately caused the Employers damages by inducing other employees not to work. Such a straightforward determination of causation does not merit review by this Court.

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[30] At p. 20 n.32 of its Petition, Local 70 states that it "does not challenge that it was responsible for the May strike. . . ."

CONCLUSION

Local 70 has failed to state any "special and important reasons" for certiorari. Local 70's repudiation of the collective bargaining agreement waived any rights it might have had to demand arbitration of the Employers' claims, so the courts below were correct to reach the merits and interpret the contract. The lower courts quite properly resolved the factual questions of breach and damages. Local 70 simply ignores the fact that this case is a straightforward action for breach of a collective bargaining agreement in which the District Court's findings were not clearly erroneous and the law was correctly applied. The only thing that stands out as unreasonable is Local 70's tenaciously inconsistent defense. Accordingly, we request that this Court deny Local 70's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Dated: September 29, 1982.

Respectfully submitted,
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APPENDIX

Respondents' Disclosure of Corporate Parents, Non-Wholly Owned Subsidiaries, and Affiliates Pursuant to United States Supreme Court Rule 28.1.

Pursuant to this Court's Rule 28.1, each corporate Respondent makes the following disclosures about its corporate parents, non-wholly owned subsidiaries, and affiliates:

ALLTRANS EXPRESS USA, INC.
Parent: Alltrans Holding
Subsidiaries/Affiliates: Alltrans Road Fast

CALIFORNIA MOTOR EXPRESS, A Division of California Motor Transport
Parent: Delta Lines, Inc./DCI Carriers
Subsidiaries/Affiliates: None

CONSOLIDATED FREIGHTWAYS
Parent: Consolidated Freightways, Inc.
Subsidiaries/Affiliates: None

CRESCENT TRUCK LINES
Parent: None
Subsidiaries/Affiliates: San Ramon Boat Works

DELTA LINES, INC.
Parent: DCI Carriers/Delta California Industries
Subsidiaries/Affiliates: None

DI SALVO TRUCKING COMPANY
Parent: RWL Investments, Inc.
Subsidiaries/Affiliates: None

EAST TEXAS MOTOR FREIGHT SYSTEM
Parent: Arkansas Best Corp.
Subsidiaries/Affiliates: None

GARRETT FREIGHTLINES, INC.
Parent: ANR Freight System/American Natural Resources
Subsidiaries/Affiliates: None

GRANNY GOOSE FOODS, INC.
Parent: G.F. Industries
Subsidiaries/Affiliates: California Pretzels Co., Inc.

IML FREIGHT, INC.
Parent: A & W Investments
Subsidiaries/Affiliates: None

LEE WAY MOTOR FREIGHT, INC.
Parent: PepsiCo, Inc.
Subsidiaries/Affiliates: None

MORRIS DRAYING CO.
Parent: None
Subsidiaries/Affiliates: Dramore Co.

NAVAJO FREIGHT LINES, INC.
Parent: Arkansas Best Corp.
Subsidiaries/Affiliates: None

O.N.C. FREIGHT SYSTEM
Parent: Rocor International
Subsidiaries/Affiliates: None

PACIFIC INTERMOUNTAIN EXPRESS CO.
Parent: I.U. Transportation Services, Inc.
Subsidiaries/Affiliates: None

PACIFIC MOTOR TRUCKING COMPANY
Parent: SP Transportation/Southern Pacific
Subsidiaries/Affiliates: None

SUNSHINE BISCUIT, INC.
Parent: American Brands, Inc.
Subsidiaries/Affiliates: Bell Brand Foods; Humpty Dumpty Foods, Ltd.

TRANSCON LINES
Parent: Transcon, Inc.
Subsidiaries/Affiliates: None

WESTERN GILLETTE, INC./ROADWAY EXPRESS, INC.
Parent: Roadway Services, Inc.
Subsidiaries/Affiliates: Roadway Express, Inc., Nevada; Roadway Express, Inc., Arizona

WILLIG FREIGHT LINES
Parent: Transport Holdings, Inc./TDG, USA, Inc.
Subsidiaries/Affiliates: None

Each of the following Respondents has no corporate parents, non-wholly owned subsidiaries, or affiliates:

ASSOCIATED FREIGHT LINES
CALIFORNIA TRUCKING ASSOCIATION
COAST DRAYAGE
FRANK'S TRUCKING
HASLETT CO.
LODI TRUCK SERVICE
STERLING TRANSIT CO., INC.
SYSTEM 99
T.I.M.E-DC, INC.
YELLOW FREIGHT SYSTEM

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No. 82-363

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

BROTHERHOOD OF TEAMSTERS & AUTO TRUCK DRIVERS,
LOCAL 70,
Petitioner,

vs.

CALIFORNIA TRUCKING ASSOCIATION, et al.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 82-363

In the Supreme Court
OF THE
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October Term, 1982

Brotherhood of Teamsters & Auto Truck Drivers,
Local 70,
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vs.

California Trucking Association, et al.,
Respondents.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I

THE DISTRICT COURT ERRONEOUSLY DETERMINED THOSE CONTRACTUAL ISSUES WHICH WERE DETERMINATIVE OF THE ARBITRABILITY ISSUE WHERE THE PARTIES HAD EXCLUSIVELY RESERVED THOSE ISSUES FOR RESOLUTION THROUGH THE GRIEVANCE PROCEDURE

As we showed in our petition, there were at least four separate determinations which were made by the district court in rendering a decision that the trial should proceed to the exclusion of the contractual grievance procedure. (Petition, p. 8-11). The employers do not contest the proposition that the grievance procedure contained in the NMFA or the JC 7 Supp. is broad enough to encompass the contractual issues which the district court decided. For example, the question of retroactivity of the 1970-1973 agreement was certainly a "grievance[] or question[] of interpretations arising under this Master Agreement or Supplemental Agreements . . ." (NMFA, Art. 8(a)) (or a dispute "affecting the mutual relations" of the Union as well as the employers under the JC 7 Supplement).

In various orders prior to the commencement of the trial, the district court held that exhaustion of the grievance procedure was not required, not because of the Union's repudiation of the agreement, but because the court did not read the collective bargaining agreements to require submission of these disputes to the grievance procedure. (App. D, p. 8-33; App. E, p. 1-7; App. F, p. 18-22; App. J, p. 1-4). Those same issues were actually tried to the court, raised in post-trial briefs and once again rejected by the district court. (App. C, p. 12-23).

The Respondents rely exclusively upon the decision of the court of appeals, which held that the Union was estopped from raising the contractual defense since it had "repudiated" the contract before the district court. This is not correct as to the issues which we have described above which were considered and rejected by the district court long before the trial began in 1975. Indeed, the district court rejected before the trial precisely the position adopted by the court of appeals:

> "Another problem that concerns the court is that the opinion in *Flair* takes no note of the point the court proceedings have reached when the arbitration question comes up. *Flair* itself was a suit to compel arbitration; the question did not, of course, come up. *Drake Bakeries* indicated that passage of time from the filing of the complaint in court might be the proper measure of whether the party demanding arbitration might be held to have waived that right; the circumstances of this case lead the court to conclude that it would be desirable to establish some rule about

> how long a party can preserve its right to shunt a matter to arbitration after a court begins to invest its time in the case. . . . The court feels that it should have at its disposal some device to minimize the disruptive potential of a demand for arbitration late in the judicial proceedings. Since no such rule seems presently to exist, the court could not refuse Local 70's demand for arbitration, but it does note that the delay in this case is not likely to disrupt the proceedings to the degree that would, in the court's opinion, justify denial of arbitration on that ground alone." App. D, p. 29-33.

We emphasize to this Court that the district court expressly rejected the proposition that Local 70's "demand for arbitration" was so late as to disrupt the proceedings or to estop the Union from raising such a defense! The district court then went on to consider the issue not only in that memorandum but in subsequent opinions as well as its opinion after the matter was tried.

Indeed, the district court expressed some vexation at the number of times which the Union raised this very issue. (See App. G, p. 1-5). Indeed, the Union sought certification under 28 U.S.C. Section 1292(b) for an interlocutory appeal, a certification which the district court rejected. *Id.*, p. 2.

Finally, when the court considered the Union's arguments after trial, it referred to "defendant's numerous motions to stay the proceedings pending exhaustion of the grievance procedures . . ." (App. C, p. 12).

When the Union's initial motion to stay or dismiss the proceedings was made, the district court considered the very question of whether the Union's conduct constituted a repudiation of the agreement so as to excuse the employer's exhaustion of the grievance procedures. The district court rejected that proposition not only because the Union had raised the issue in a timely fashion but because the law required the question of repudiation to be determined by the arbitrator. (App. D, p. 21-29).

Nor as a factual matter did Local 70 repudiate any contractual obligation once the strike ended. The record before the district court in the trial was that once the strike ended the Union litigated its obligation to be bound to the 1970-1973 agreement before the Labor Board and the court of appeals. Yet, during that time it accepted the provisions of the contract, processed grievances under the contract and otherwise recognized its legal obligations.

Finally, we remind this Court that the district court in fact stayed all proceedings for claims arising on or after the date of May 18, 1970 because it found that the grievance procedure in existence after that date clearly encompassed any employer damage claims. Having done so, the district court expressly had to reject any claim that the Union's conduct so constituted a repudiation of the judicial process that any demand for arbitration was waived.

We, thus, return to the original proposition which the employers in their response have ignored: In determining that the employers' claims were not subject to the grievance procedure, even though the grievance procedure on its face encompasses those claims, the district court erroneously determined issues of contractual interpretation so as to avoid the grievance procedure. The issue as we presented it in our petition is squarely placed to this Court: Where a court is faced with issues of contractual interpretation which determine the arbitrability of a dispute, should the court intrude upon the collective bargaining agreement by deciding those issues, or should the court either stay its hand or dismiss the proceedings so that the parties may have those issues determined by their chosen process of dispute resolution?

II

THE LUCAS FLOUR RULE IS NOT APPLICABLE UNLESS THERE IS A PROCEDURE FOR FINAL AND BINDING ARBITRATION

We agree with the employers in their response that the grievance procedure contained in the Joint Council No. 7 Supplement as well as in the National Master Freight Agreement has certain characteristics of arbitration. Moreover, we agree that it is the process by which the parties have chosen to resolve contractual disputes. Thus, the court below was correct in characterizing that procedure as one in the nature of arbitration.

Yet, however, that begs the precise question which we have posed to this Court. That procedure which the parties chose specifically precluded and specifically excluded final and binding arbitration by neutral party for the resolution of any dispute, with the exception of any claim involving the discharge of an employee where a supplemental agreement contains such a procedure. Having expressly rejected final and binding arbitration, the parties, however, recognize that it was well settled that should a joint labor-management committee reach a majority decision that decision would be fully enforceable, as if it were an award from a neutral arbitrator. That is the doctrine of *General Drivers, Teamsters v. Ris & Co.,* 372 U.S. 517 (1973). (App. A, p. 36-38).

In this case, however, where the parties exclude the possibility of final resolution through binding arbitration, does the *Lucas Flour* doctrine impose an obligation not to strike, absent the parties' expressed understanding that no strikes will occur until the grievance procedure has been exhausted.[1]

---

[1] The parties could, of course, agree that there would be no strike pending exhaustion of the grievance procedure and grant the right of the Union or the employer to take economic action after the grievance procedure was exhausted with no finality. See, e.g., *United Brotherhood of Carpenters v. Hensel Phelps Construction Co.,* 376 F.2d 731 (10th Cir. 1967), *cert. den.,* 389 U.S. 952.

There are important policy reasons for distinguishing between those grievance procedures which have finality and those which do not. Most importantly, the policy behind *Lucas Flour* which recognizes the *quid pro quo* is unavailing where the employer has not agreed upon final and binding arbitration to resolve disputes. Indeed, it must be contemplated by the parties that either side can take economic action to resolve contractual disputes where the parties can only agree upon a joint labor-management committee system which does not promise final resolution of any dispute.

Thus, the characterization by the court below of the grievance procedure process as one of "arbitration" does not answer the issue left open by this Court in *Chauffeurs, Teamsters and Helpers Local Union No. 795 v. Yellow Freight Lines,* 370 U.S. 711 (1962).

III

THE UNION'S CLAIM FOR WAGES AND BENEFITS DIFFERENT THAN THAT NEGOTIATED BY THE NATIONAL PARTIES WAS NOT SUBJECT TO RESOLUTION THROUGH THE GRIEVANCE PROCEDURE

As we point out in our petition, where a union engages in economic action to force an employer to agree to terms and conditions of a contract, those issues are not resolved through the grievance procedure of a contract unless the parties have agreed to interest arbitration. (Petition, p. 16-18). The parties have not, of course, agreed to interest arbitration to resolve such contractual disputes. Cf. Morris, *"The Role of Interest Arbitration in a Collective Bargaining System,"* 1 Indus. Rel. L.J. 427 (1976).

In response to our petition, the Respondents assert that the question of whether Local 70 was bound to the agreement reached by any multi-employer/multi-union bargaining was subject to resolution through the grievance procedure. (Response, p. 19-20). Yet, the employers do not respond to the other point which we make: Nothing suggests that the Union could grieve its claim for higher wages. If the employers earnestly made such a contention, they would then subject the resolution of any contractual demand during a bargaining session to the grievance procedure, something the parties specifically prohibited because they intended collective bargaining to resolve such issues, not through the process of a grievance procedure.

IV

THE COURT BELOW IGNORED A DECISION REACHED BY THE NATIONAL GRIEVANCE COMMITTEE EXPRESSLY INTERPRETING THE LANGUAGE OF THE COLLECTIVE BARGAINING AGREEMENT

In our petition we point out that the district court interpreted a provision of the contract to prohibit strike, after the termination of the agreement, unless an impasse in negotiations had occurred between the parties. (Petition, p. 18-19).

As we pointed out, the National Grievance Committee, which is the final "arbiter" of any contractual interpretation issue, expressly ruled that either the employer or the Union was free "unilaterally to determine when economic recourse (strike or lockout) was necessary if no agreement had been reached on proposed revisions . . ." (App. H, p. 1-3).

The employers respond by saying that that interpretation has nothing to do with the issue here. That rejoinder is incorrect. The interpretation reflected in Appendix H was reached with respect to the 1973-1976 agreement, the language of which was precisely the same as was interpreted by the district court in this case.

That Grievance Committee award was brought to the attention of the Court of Appeals by way of a request that the court take judicial notice of that decision. That was thought to be the appropriate process since the United States District Court for the Northern District of California had dismissed a similar action brought by a different employer relying precisely upon the same theory. That decision of the District Court was subsequently affirmed by the Ninth Circuit when it granted the request of various parties to dismiss the appeal lodged by certain employers from the dismissal. See *Western Conference of Teamsters v. Ringsby Truck Lines,* ...... F.2d ...... (9th Cir. 1982).[8] Had the Ninth Circuit considered the *Ringsby* appeal, and confirmed the order of the District Court, then there would have been conflicting decisions within the same circuit with respect to the meaning of the contractual provisions in dispute in this case. This all emphasizes the issue which we have presented to this Court: Whether a court may ignore the settled interpretation of a collective bargaining agreement, which interpretation has been the result of a final and binding decision of a grievance committee. It is a point presently pending before this Court in *W. R. Grace and Co. v. Rubber Workers, No. 81-1314 (cert. granted).*

V

WHERE THE UNION HAS NO CONTRACTUAL OBLIGATION, DAMAGES MAY NOT BE IMPOSED FOR PICKETING ACTIVITY

We have argued in our petition that a no-strike pledge may only run to those employees covered in the unit represented by a union. (Petition, p. 20-21). We, of course, concede that a union could give a far broader pledge: Not only not to strike, but also not to picket any other location nor even to respect a picket line established at any location of the employer. See *Buffalo Forge Co. v. United Steelworkers,* 428 U.S. 397 (1976). In this case, however, there was no such no-strike pledge anywhere in any collective bargaining agreement, except that which is to be implied under the *Lucas Flour* doctrine.

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[8] The citation given in our petition at footnote 20 is now incorrect since the court has now modified its opinion. The substance, however, remains the same.

With this in mind, we have argued that the Union's picketing, something which we concede for purpose of this petition was caused by Local 70, at terminals outside of the Union's jurisdiction or which picketing had the effect of inducing employees in other bargaining units to respect, was not a violation of the collective bargaining agreement. We emphasize our point: The Union is not bound not to engage in picketing which has the effect of inducing employees who are not represented by it to cease working. Indeed, whether they choose to respect the picket lines is governed either by their collective bargaining agreement or by other provisions of the National Labor Relations Act.

We have suggested that the Ninth Circuit's approach to this problem is terribly inconsistent with the federal labor laws which provide that a union may engage in economic activity so long as it is neither given a no-picketing pledge in its collective bargaining agreement or there was not some other violation of the federal labor laws.

The employers are incorrect in their reading of *Eazor Express, Inc., v. International Brotherhood of Teamsters*, 520 F.2d 951 (3d Cir. 1975), *cert. den.*, 424 U.S. 935 (1976). The Union's picketing outside of its jurisdiction was not subject to contractual damages. *Id.* at 965. That is our point!

It is the policy question left open in *Buffalo Forge Co., supra,* with respect to the obligation of a union to respond in damages for such stranger picketing which is before this Court and of which we seek review.

CONCLUSION

We submit that substantial issues of federal law as well as labor relations policy are presented in the issues posed to this Court. For the reasons stated in our initial petition as well as in this response, the petition for writ of certiorari should be granted.

Dated: October 22, 1982

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